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## Sitting in Congress and Standing in Court: How Presidential Signing Statements Open the Door to Legislator Lawsuits

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# SITTING IN CONGRESS AND STANDING IN COURT: HOW PRESIDENTIAL SIGNING STATEMENTS OPEN THE DOOR TO LEGISLATOR LAWSUITS

**Abstract:** Federal courts have struggled to establish a consistent doctrine regarding when legislators have standing to sue in their official capacity. Presidential signing statements add a new element to this often unclear area of law. This Note argues that signing statements do not reach the level of vote nullification, the only injury that the Supreme Court has held sufficient for legislator standing. Despite this, signing statements can potentially injure legislators in a concrete and particularized manner sufficient for standing. When the President asserts the right to deny legislators information to which they are statutorily entitled, and follows through with that assertion, legislators who desire to challenge that action in federal court should be granted standing.

## INTRODUCTION

On July 26, 2006, Senator Arlen Specter introduced a bill into the U.S. Senate that proposes granting legislators standing to challenge the legality of presidential signing statements.<sup>1</sup> This bill was the product of a growing concern that President George W. Bush was abusing the practice of issuing signing statements.<sup>2</sup> In introducing the bill, Senator Specter emphasized that although the use of signing statements has been commonplace in our nation's history, the President cannot be permitted to use this device to rewrite the laws that Congress passes.<sup>3</sup> Senator Specter and others claimed that signing statements were becoming a method by which the President could circumvent the consti-

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<sup>1</sup> Presidential Signing Statements Act of 2006, S. 3731, 109th Cong. § 5 (2006). This bill also instructs state and federal courts to afford no weight to signing statements when interpreting federal statutes. *Id.* § 4.

<sup>2</sup> See 152 CONG. REC. S8271 (daily ed. July 26, 2006) (statement of Sen. Specter) (noting that "President Bush has used signing statements in ways that have raised some eyebrows"); see also *infra* notes 182–215 and accompanying text.

<sup>3</sup> 152 CONG. REC. S8271 (statement of Sen. Specter) ("The President cannot use a signing statement to rewrite the words of a statute nor can the President use a signing statement to selectively nullify those provisions he does not like. This much is clear from our Constitution.").

tutional procedures for enacting legislation and that this bill was necessary to safeguard those constitutional procedures.<sup>4</sup>

Although the practice of issuing signing statements has been controversial in its own right,<sup>5</sup> Senator Specter's proposal raises unique questions about when federal legislators have standing to sue the executive branch for injuries to their lawmaking power.<sup>6</sup> In determining whether a party has standing, the U.S. Supreme Court has placed particular emphasis on the nature of the injury that is suffered.<sup>7</sup> Although the Court has held that the nullification of a specific vote is sufficient for legislators to have standing, it is not clear whether presidential signing statements could ever amount to nullification.<sup>8</sup> Furthermore, questions remain about whether any injuries other than vote nullification are sufficient to give legislators standing.<sup>9</sup> The answers to these questions depend heavily on the principle of separation of powers and an understanding of the proper role of the federal courts under Article III of the Constitution.<sup>10</sup>

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<sup>4</sup> See *id.* ("If the President is permitted to rewrite the bills that Congress passes and cherry pick which provisions he likes and does not like, he subverts the constitutional process designed by our Framers."); *Presidential Signing Statements: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) [hereinafter *Senate Hearing on Presidential Signing Statements*] (statement of Sen. Patrick Leahy, Ranking Member, S. Comm. on the Judiciary) (stating that the use of signing statements "poses a grave threat to our constitutional system of checks and balances").

<sup>5</sup> See *infra* notes 173-199 and accompanying text.

<sup>6</sup> See *Raines v. Byrd*, 521 U.S. 811, 830 (1997) (holding that a group of federal legislators lacked standing to challenge executive branch action); *Coleman v. Miller*, 307 U.S. 433, 446 (1939) (holding that a group of state legislators had standing to challenge action taken by the state's lieutenant governor); see also Anthony Clark Arend & Catherine B. Lotrionte, *Congress Goes to Court: The Past, Present, and Future of Legislator Standing*, 25 HARV. J.L. & PUB. POL'Y 209, 213 (2001) (arguing that legislators suing in their official capacity should never be granted standing); R. Lawrence Dessem, *Congressional Standing to Sue: Whose Vote Is This, Anyway?*, 62 NOTRE DAME L. REV. 1, 26 (1986) (arguing that individual legislators should not be granted standing to sue for official injuries to their lawmaking powers, but Congress as a whole could qualify for standing); Carlin Meyer, *Imbalance of Powers: Can Congressional Lawsuits Serve as Counterweight?*, 54 U. PITT. L. REV. 63, 70 (1992) (arguing that legislators should be granted standing when they bring claims that fundamentally concern the constitutional allocation of powers between the executive branch and Congress); James I. Alexander, Note and Comment, *No Place to Stand: The Supreme Court's Refusal to Address the Merits of Congressional Members' Line-Item Veto Challenge in Raines v. Byrd*, 6 J.L. & POL'Y 653, 698 (1998) (arguing that diminution of legislative power should qualify as a sufficient injury to give legislators standing in the federal courts).

<sup>7</sup> See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

<sup>8</sup> See *Raines*, 521 U.S. at 823; *Coleman*, 307 U.S. at 446.

<sup>9</sup> See *Raines*, 521 U.S. at 823 (holding that vote nullification could give legislators standing, but not foreclosing the possibility that other injuries might be sufficient).

<sup>10</sup> See U.S. CONST. art. III, § 2 (stating that the judicial power shall extend to "cases" and "controversies"); *Raines*, 521 U.S. at 819-20 (stating that the standing inquiry is espe-

This Note analyzes the issue of granting legislators standing to challenge presidential signing statements.<sup>11</sup> It argues that, although generally a challenge to presidential signing statements is not sufficient to give legislators standing,<sup>12</sup> in some circumstances the use of this device can cause concrete and particularized injury to legislators sufficient to confer standing.<sup>13</sup> Part I discusses the doctrine of standing, particularly the U.S. Supreme Court's articulation of how standing relates to the doctrine of the separation of powers.<sup>14</sup> Part II explores the history of legislator standing.<sup>15</sup> Specifically, it analyzes the U.S. Court of Appeals for the District of Columbia Circuit's various approaches to this issue and also the Supreme Court's treatment of legislator claims.<sup>16</sup> Part III presents the topic of presidential signing statements and discusses the controversy surrounding President George W. Bush's use of this device.<sup>17</sup> Part IV argues that, although in most circumstances legislators do not have standing to sue the President over signing statements, when the President uses signing statements to deprive legislators of information to which they are entitled, they suffer a concrete and particularized injury adequate for standing.<sup>18</sup>

## I. THE DOCTRINE OF STANDING: HOW THE SEPARATION OF POWERS RESTRICTS ACCESS TO THE FEDERAL COURTS

Standing is the determination of whether a particular litigant has a sufficient personal stake in a controversy to entitle him or her to judicial resolution of that controversy.<sup>19</sup> The doctrine is rooted in Article

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cially rigorous when reaching the merits of a dispute would force the court to decide whether the action taken by one of the other two branches of the federal government was unconstitutional). In *Lujan*, the Court stated that Article III was aimed at limiting the jurisdiction of the federal courts to disputes involving the rights of individuals, and not vindicating the public interest. 504 U.S. at 576 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803)).

<sup>11</sup> See *infra* notes 223–313 and accompanying text.

<sup>12</sup> See *infra* notes 227–283 and accompanying text.

<sup>13</sup> See *infra* notes 284–313 and accompanying text.

<sup>14</sup> See *infra* notes 19–50 and accompanying text.

<sup>15</sup> See *infra* notes 51–160 and accompanying text.

<sup>16</sup> See *infra* notes 51–160 and accompanying text.

<sup>17</sup> See *infra* notes 161–222 and accompanying text.

<sup>18</sup> See *infra* notes 223–313 and accompanying text.

<sup>19</sup> *Sierra Club v. Morton*, 405 U.S. 727, 731–32 (1972); see also *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (describing standing as the question of whether a litigant is entitled to have the court decide the merits of a dispute); *Baker v. Carr*, 369 U.S. 186, 204 (1962) (describing standing as the question of whether the appellants alleged such a personal stake in the outcome of a controversy to assure that issues are presented with concrete adverseness); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation*

III, Section 2, Clause 1 of the U.S. Constitution, which limits the jurisdiction of the federal courts to actual "cases" and "controversies."<sup>20</sup> The federal courts have developed several justiciability doctrines to aid in determining which disputes are proper for adjudication.<sup>21</sup> Of these justiciability doctrines, standing has been called the most important because it essentially determines who can bring a suit in federal court.<sup>22</sup> The doctrine has also proven to be one of the most criticized and inconsistent in all of constitutional law.<sup>23</sup>

### A. *The Requirements of Standing*

The U.S. Supreme Court has developed three irreducible constitutional elements that must be satisfied for a plaintiff to be granted standing.<sup>24</sup> First, a plaintiff must have suffered an injury in fact.<sup>25</sup> Second, that injury must be fairly traceable to the defendant's allegedly unlawful conduct.<sup>26</sup> Third, a favorable decision must be likely to redress the injury.<sup>27</sup>

The Court has elaborated considerably on the requirement that a plaintiff demonstrate an injury in fact.<sup>28</sup> To satisfy this requirement, a plaintiff must show an invasion of a legally protected interest that is

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of Powers, 17 SUFFOLK U. L. REV. 881, 882 (1983) (describing standing as the answer to the question, "What's it to you?").

<sup>20</sup> U.S. CONST. art. III, § 2, cl. 1; *Allen v. Wright*, 468 U.S. 737, 750 (1984).

<sup>21</sup> See *Allen*, 468 U.S. at 750. "Justiciability" is a term employed to describe the limitations that the "case" and "controversy" requirements of Article III place upon the federal courts. *Flast v. Cohen*, 392 U.S. 83, 95 (1968). The justiciability doctrines that have arisen to restrict the federal courts to their appropriate role include the prohibition against advisory opinions, the political question doctrine, mootness, ripeness, and standing. See *Vander Jagt v. O'Neil*, 699 F.2d 1166, 1178-79 (D.C. Cir. 1983) (Bork, J., concurring); see also *Flast*, 392 U.S. at 95.

<sup>22</sup> See *Allen*, 468 U.S. at 750.

<sup>23</sup> See *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State*, 454 U.S. 464, 475 (1982) ("We need not mince words when we say that the concept of 'Art. III standing' has not been defined with complete consistency in all of the various cases decided by this Court . . ."); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 60 (2d ed. 2002) ("Standing frequently has been identified by both justices and commentators as one of the most confused areas of the law."); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 390 (3d ed. 2000) ("[T]he law of standing has for some time been one of the most criticized aspects of constitutional law.").

<sup>24</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

<sup>25</sup> *Id.* at 560; *Allen*, 468 U.S. at 751.

<sup>26</sup> *Lujan*, 504 U.S. at 560; *Allen*, 468 U.S. at 751.

<sup>27</sup> *Lujan*, 504 U.S. at 561; *Allen*, 468 U.S. at 751.

<sup>28</sup> See *Lujan*, 504 U.S. at 560.

concrete and particularized, and actual or imminent.<sup>29</sup> The Court has rigorously enforced this requirement and has routinely dismissed cases where a plaintiff has failed to demonstrate an injury of this sort.<sup>30</sup>

In addition to constitutional standing requirements, the Court has embraced several judicially self-imposed limits on the exercise of federal jurisdiction.<sup>31</sup> The Court specifically has identified several of these "prudential" requirements that are not rooted in Article III and therefore can be overcome by congressional statute.<sup>32</sup> First, a plaintiff generally may assert only his or her own legal rights and cannot raise the claims of third parties.<sup>33</sup> Second, a plaintiff must raise a claim within the "zone of interests" protected by the law invoked.<sup>34</sup>

A third requirement that prohibits plaintiffs from asserting generalized grievances was once thought to be a prudential requirement, but the Court has more recently indicated that it is part of the constitu-

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<sup>29</sup> *Id.* The Court has held that Congress can create legally protected interests by statute. See *Warth*, 422 U.S. at 514 ("Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute."); *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 212 (1972) (White, J., concurring) (stating that in the absence of the Civil Rights Act of 1968, plaintiffs would not have had standing to bring their case, but that the statute conferred standing upon them). But see *Lujan*, 504 U.S. at 573 (holding that the injury-in-fact requirement was not satisfied by "congressional conferral upon all persons of an abstract, self-contained, noninstrumental 'right' to have the Executive observe the procedures required by law").

<sup>30</sup> See *Lujan*, 504 U.S. at 564 (holding that plaintiffs had not demonstrated an actual or imminent injury where the alleged harm was a decreased likelihood of viewing endangered species at some undetermined future time); *Allen*, 468 U.S. at 754-56 (holding that plaintiffs who alleged harm based on the IRS granting tax-exempt status to racially discriminatory schools did not demonstrate a particularized injury because they were not personally denied equal treatment); *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983) (holding that a plaintiff, despite being subject to a "chokehold" by Los Angeles police officers in the past, did not demonstrate actual or imminent injury in a suit seeking to enjoin the city from using "chokeholds" in the future).

<sup>31</sup> *Allen*, 468 U.S. at 751.

<sup>32</sup> *CHEMERINSKY*, *supra* note 23, at 63; see *Allen*, 468 U.S. at 751; *Warth*, 422 U.S. at 499.

<sup>33</sup> *Allen*, 468 U.S. at 751; *Warth*, 422 U.S. at 499.

<sup>34</sup> *Allen*, 468 U.S. at 751; *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 155-56 (1970) (holding that data processing companies were within the zone of interests protected by a statute that barred bank service corporations from "engaging in any activity other than the performance of bank services for banks"). The "zone of interests" requirement primarily has been applied to administrative law cases when the plaintiff is not directly regulated by the administrative agency at issue. *CHEMERINSKY*, *supra* note 23, at 101. In these circumstances, the Court has required that the plaintiffs demonstrate that they are within the zone of interests protected by the statute in question to qualify for standing. See *Camp*, 397 U.S. at 153.

tional standing inquiry.<sup>35</sup> In 1968, in *Flast v. Cohen*, the Court held that a taxpayer challenge to federal expenditures, which the taxpayer alleges to be a violation of the Establishment Clause of the First Amendment, satisfies the requirements of standing.<sup>36</sup> In reaching this conclusion, the Court explicitly stated that Article III is not an absolute bar to federal taxpayer suits.<sup>37</sup> Eight years later, in *Warth v. Seldin*, the Court confirmed that the prohibition against generalized grievances is a prudential requirement apart from the constitutional minimum required for standing.<sup>38</sup>

Despite these indications that the prohibition on generalized grievances is a prudential limitation on standing, the Court, in 1992 in *Lujan v. Defenders of Wildlife*, held that the Constitution mandates this prohibition.<sup>39</sup> At issue in *Lujan* were provisions of the Endangered Species Act of 1973 (the "Act") that purported to grant any citizen the right to sue the government for not acting in compliance with the Act.<sup>40</sup> Despite this language in the statute, the Court held that plaintiffs' assertion of a generalized grievance does not confer standing upon them.<sup>41</sup> Writing for the majority, Justice Scalia explained that Congress cannot convert the public interest in proper administration of the laws into a private right sufficient for Article III standing by simply passing a statute.<sup>42</sup> After *Lujan*, therefore, the bar against hearing generalized grievances is best understood as a constitutional requirement for standing.<sup>43</sup>

### B. Using Standing to Protect the Separation of Powers

The U.S. Supreme Court's evolving jurisprudence regarding standing for generalized grievances reflects a broader shift in its understanding of the relationship between standing and the doctrine of the sepa-

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<sup>35</sup> Compare *Flast*, 392 U.S. at 101 ("[W]e find no absolute bar in Article III to suits by federal taxpayers challenging allegedly unconstitutional federal taxing and spending programs."), with *Lujan*, 504 U.S. at 573-74 ("We have consistently held that a plaintiff raising only a generally available grievance about government . . . does not state an Article III case or controversy.").

<sup>36</sup> 392 U.S. at 105-06.

<sup>37</sup> *Id.* at 101.

<sup>38</sup> See 422 U.S. at 499 (describing the bar against generalized grievances as being apart from the minimum constitutional mandate).

<sup>39</sup> See 504 U.S. at 573-74.

<sup>40</sup> *Id.* at 571-72.

<sup>41</sup> See *id.* at 573-74.

<sup>42</sup> *Id.* at 576-77.

<sup>43</sup> See *id.* at 573-74; see also Scalia, *supra* note 19, at 886 (stating that Congress's ability to convert generalized benefits into legal rights is limited by the core constitutional standing requirements).

ration of powers.<sup>44</sup> Early interpretations of the doctrine of standing were concerned primarily with whether the dispute before a court presented concrete adverseness and a form capable of judicial resolution.<sup>45</sup> The Court's more recent decisions, however, describe standing as focused on limiting the federal courts to their proper role in a democratic society.<sup>46</sup>

In *Lujan*, the Court relied specifically on separation of powers concerns in holding that Congress cannot convert generalized grievances into individual rights cognizable for standing.<sup>47</sup> Generalized grievances, the Court reasoned, involve vindicating the public interest, a function of the legislative and executive branches.<sup>48</sup> Only when a case presents injury to an individual right is the judicial branch best suited to resolve the matter.<sup>49</sup> Respect for the roles of the coordinate branches

<sup>44</sup> See *TRIBE*, *supra* note 23, at 387–88 (describing how in recent years the Court has dramatically altered the focus of the standing inquiry to include separation of powers concerns); Scalia, *supra* note 19, at 897–98 (stating that although separation of powers concerns had all but been eliminated from the standing inquiry, recent cases “explicitly acknowledge that standing and separation of powers are intimately related”). Compare *Flast*, 392 U.S. at 100 (“The question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems . . .”), with *Warth*, 422 U.S. at 498 (“[Standing] is founded in concern about the proper—and properly limited—role of the courts in a democratic society.”), and *Allen*, 468 U.S. at 752 (“[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers.”).

<sup>45</sup> See *Flast*, 392 U.S. at 101; *Baker*, 369 U.S. at 204.

<sup>46</sup> *Lujan*, 504 U.S. at 576–77; *Allen*, 468 U.S. at 752; *Valley Forge*, 454 U.S. at 472.

<sup>47</sup> 504 U.S. at 576–77.

<sup>48</sup> *Id.* at 576.

<sup>49</sup> See *id.* (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803)); see also *Arend & Lotrionte*, *supra* note 6, at 280–81 (“[C]ourts, as the only non-elected Branch of government, would be overstepping their role if they were to engage in a review of the intra- and inter-Branch disputes unless somehow such disputes affected rights of private individuals.”); Scalia, *supra* note 19, at 894–95 (“Unless the plaintiff can show some respect in which he is harmed *more* than the rest of us . . . he has not established any basis for concern that the majority is suppressing or ignoring the rights of a minority that wants protection, and thus has not established the prerequisite for judicial intervention.”). For differing views on standing and separation of powers generally, see Donald L. Doernberg, “We the People”: *John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action*, 73 CAL. L. REV. 52 (1985) (arguing that there are collective rights for which standing should be allowed); Gene R. Nichol, *Abusing Standing: A Comment on Allen v. Wright*, 133 U. PA. L. REV. 635 (1985) (arguing that the doctrine of standing is ill-suited to serving separation of powers goals and should instead remain a threshold question used only to measure a litigant’s stake in a case); Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393 (1996) (arguing that historic evidence of Federalist theory indicates that the use of justiciability doctrines to avoid hearing cases, rather than judicial review, poses a greater risk to the separation of powers); Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, Injuries, and Article III*, 91 MICH. L. REV. 163 (1992) (arguing that the “citizen suits”



has also led the Court to state that the standing inquiry is especially rigorous when hearing a case would require a court to decide whether an action taken by one of the political branches is unconstitutional.<sup>50</sup>

## II. FROM *COLEMAN V. MILLER* TO *RAINES V. BYRD*: THE HISTORY OF LEGISLATOR STANDING

The U.S. Supreme Court has addressed the issue of legislator standing in two contexts: legislator suits based on an injury to an individual interest,<sup>51</sup> and suits based on an injury to an institutional interest.<sup>52</sup> Injury to an individual interest requires personal harm to a legislator,<sup>53</sup> whereas injury to an institutional interest involves harm to a legislator's official lawmaking power.<sup>54</sup> Although the Court has granted standing to legislators asserting an individual injury,<sup>55</sup> a challenge to presidential signing statements could only constitute an institutional injury because signing statements are by definition a response to legislators exercising their official lawmaking power.<sup>56</sup> The remainder of this Note thus examines a legislator's standing in the context of an institutional injury.<sup>57</sup>

This Part explores the Supreme Court's and lower courts' treatment of standing where legislator plaintiffs allege an institutional injury.<sup>58</sup> This history demonstrates that even though the federal courts

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rejected by the Court in *Lujan* are not inconsistent with Article III standing, despite the fact that the injury is often to a majority interest).

<sup>50</sup> *Raines v. Byrd*, 521 U.S. 811, 830 (1997) (holding that a group of U.S. Representatives did not have standing to sue executive branch officials over the use of the Line Item Veto).

<sup>51</sup> See *Powell v. McCormack*, 395 U.S. 486, 516-18 (1969); *Bond v. Floyd*, 385 U.S. 116, 131 (1966).

<sup>52</sup> *Raines v. Byrd*, 521 U.S. 811, 821 (1997); *Coleman v. Miller*, 307 U.S. 433, 438 (1939).

<sup>53</sup> See *Powell*, 395 U.S. at 493 (Congressman denied his seat in the U.S. House of Representatives and deprived of his salary).

<sup>54</sup> See *Raines*, 521 U.S. at 816 (dilution of legislative power); *Coleman*, 307 U.S. at 438 (vote nullification).

<sup>55</sup> See *Powell*, 395 U.S. at 493, 516-18 (holding that a U.S. Representative who had been denied his seat in the House of Representatives and deprived of his salary presented a justiciable case); *Bond*, 385 U.S. at 118, 131 (holding that the Court had jurisdiction to review the case of a plaintiff who had been elected to, but was nonetheless excluded from, the Georgia House of Representatives).

<sup>56</sup> For a discussion of signing statements, see *infra* notes 161-222 and accompanying text.

<sup>57</sup> Cf. *Raines*, 521 U.S. at 817 (members of Congress claimed a dilution of their legislative power); *Coleman*, 307 U.S. at 436 (Kansas state legislators claimed that their votes had been nullified).

<sup>58</sup> See *infra* notes 60-160 and accompanying text.

have settled on a doctrine of legislator standing that follows the traditional standing inquiry (requiring injury to a legally protected interest, causation, and redressability), demonstrating concrete and particularized injury is a difficult hurdle for legislator plaintiffs.<sup>59</sup>

A. *Coleman v. Miller: The U.S. Supreme Court  
Recognizes Legislator Standing*

The earliest U.S. Supreme Court decision to address the issue of legislator standing for an institutional injury is the 1939 case of *Coleman v. Miller*.<sup>60</sup> In *Coleman*, the Court granted standing to a group of state legislators from Kansas who challenged the procedures employed in ratifying an amendment to the U.S. Constitution.<sup>61</sup> After a vote on the amendment in the state senate was split, the lieutenant governor cast the deciding vote in favor of the amendment.<sup>62</sup> A group of legislators (including all twenty state senators who voted against the amendment) challenged the propriety of this action, claiming an injury to their power as legislators.<sup>63</sup> The injury at issue, the Court explained, was that these legislators' votes had been "overridden" and "virtually held for naught."<sup>64</sup> The Court concluded that these legislators had an interest in maintaining the effectiveness of their votes and that the alleged injury to that interest was therefore sufficient for standing purposes.<sup>65</sup>

A separate opinion that Justice Frankfurter authored strongly criticized the Court's decision to grant standing to these legislators.<sup>66</sup> Justice Frankfurter first explained that the injury suffered by plaintiffs not among the twenty senators who voted against ratification was no different from that of any other citizen.<sup>67</sup> Unlike the twenty senators who voted against ratification, these other senators had not seen their votes "held for naught" and therefore presented only a generalized grievance

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<sup>59</sup> See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (explaining that the Constitution requires plaintiffs to show injury, causation, and redressability to have standing in federal court); *Riegle v. Fed. Open Mkt. Comm.*, 656 F.2d 873, 878 (D.C. Cir. 1981) (holding that the traditional standing tests applied to noncongressional plaintiffs apply to members of Congress as well); see also *Raines*, 521 U.S. at 818–19, 830 (applying the traditional standing test to members of Congress but holding that dilution of voting power is not an injury sufficient for standing).

<sup>60</sup> 307 U.S. at 437.

<sup>61</sup> *Id.* at 436–37.

<sup>62</sup> *Id.* at 436.

<sup>63</sup> *Id.* at 436, 438.

<sup>64</sup> *Id.* at 438.

<sup>65</sup> *Coleman*, 307 U.S. at 438, 446.

<sup>66</sup> *Id.* at 460 (Frankfurter, J.).

<sup>67</sup> *Id.* at 467.

insufficient for standing.<sup>68</sup> As for the former group, Justice Frankfurter stated that the procedures for voting in legislative assemblies are the essence of political action and therefore cannot constitute private damage sufficient for standing.<sup>69</sup>

*Coleman* remains the only case in which the Court has held that legislators have standing to sue based on an institutional injury.<sup>70</sup> Although it therefore represents an important precedent, it leaves undecided many issues regarding the circumstances in which legislator standing is permissible.<sup>71</sup> For one, *Coleman* involved state legislators and may not raise the same concerns about separation of powers that are involved in a suit brought by federal legislators.<sup>72</sup> Furthermore, the Kansas Supreme Court in *Coleman* had already treated the senators' interest in their votes as a basis for entertaining the suit.<sup>73</sup> Granting standing in this circumstance, where a state court has already determined that plaintiffs have a sufficient interest, could be distinguished from a suit by federal legislators where a federal court would make the determination about whether federal legislators' interest is sufficient for standing.<sup>74</sup> Finally, all twenty senators who had allegedly been disenfranchised were parties in the suit.<sup>75</sup> Whether the participation of all the disenfranchised senators was an essential element in granting standing is another question left unanswered.<sup>76</sup> Although *Coleman* established that legislators can have standing, it left later decisions to develop the specific contours of this doctrine.<sup>77</sup>

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<sup>68</sup> *Id.*; cf. *id.* at 438 (majority opinion) (granting standing to legislators whose votes had been "overridden and virtually held for naught").

<sup>69</sup> *Id.* at 469-70 (Frankfurter, J.).

<sup>70</sup> See *Coleman*, 307 U.S. at 446; see also *Raines*, 521 U.S. at 830 (holding that legislative plaintiffs lacked standing).

<sup>71</sup> See Arend & Lotrionte, *supra* note 6, at 220 (arguing that *Coleman* raised more questions than it answered).

<sup>72</sup> See *Raines*, 521 U.S. at 824 n.8 (acknowledging, but not deciding, that *Coleman* may be distinguishable from a case involving federal legislators on these grounds).

<sup>73</sup> *Coleman*, 307 U.S. at 446.

<sup>74</sup> See *Raines*, 521 U.S. at 824 n.8 (citing *Coleman*, 307 U.S. at 446) (acknowledging, but not deciding, that *Coleman* may be distinguishable on these grounds).

<sup>75</sup> *Coleman*, 307 U.S. at 436.

<sup>76</sup> See Arend & Lotrionte, *supra* note 6, at 221.

<sup>77</sup> See generally *Raines*, 521 U.S. 811; *Riegle*, 656 F.2d 873; *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974); *Mitchell v. Laird*, 488 F.2d 611 (D.C. Cir. 1973).

### B. *The D.C. Circuit's Evolving Approaches to Legislator Standing*

During the 1970s and 1980s, numerous suits brought by federal legislators against the executive branch came before the D.C. Circuit.<sup>78</sup> With only minimal guidance from the Supreme Court's decision in *Coleman*, the D.C. Circuit began to develop its own approaches to the problem of legislator standing.<sup>79</sup> During the years between *Coleman* and the Supreme Court's revisitation of the issue in *Raines v. Byrd* in 1997,<sup>80</sup> the D.C. Circuit developed three distinct approaches to the doctrine of legislator standing.<sup>81</sup>

The first approach granted standing to legislators if a declaration by the courts as to the legality of executive branch action would "bear upon" the duties of members of Congress to take legislative action.<sup>82</sup> The second approach applied a more stringent test for legislator standing, requiring plaintiffs to demonstrate that their votes had been nullified and requiring that no legislative remedies remain at their disposal.<sup>83</sup> The third approach abandoned the requirement that all legislative remedies be exhausted and instead called on the courts, after addressing standing, to exercise their "equitable discretion" in determining whether legislator claims should be heard.<sup>84</sup>

#### 1. The First Approach: *Mitchell v. Laird* and the "Bears Upon" Test

The D.C. Circuit's first approach to legislator standing was articulated in 1973 in *Mitchell v. Laird*, where the court held that members of Congress had standing.<sup>85</sup> That case involved a suit that members of Congress brought against executive branch officials for allegedly waging an unconstitutional war in Southeast Asia.<sup>86</sup> The court held that where a judicial declaration that executive branch action is unconstitutional would bear upon the duties of the plaintiffs to take legislative action (whether it be impeachment, withholding of appropriations, or some other response), standing is appropriate.<sup>87</sup> This so-called "bears

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<sup>78</sup> See *Riegle*, 656 F.2d at 874; *Kennedy*, 511 F.2d at 432; *Mitchell*, 488 F.2d at 613.

<sup>79</sup> See *Riegle*, 656 F.2d at 878; *Kennedy*, 511 F.2d at 434, 436; *Mitchell*, 488 F.2d at 614.

<sup>80</sup> 521 U.S. at 814.

<sup>81</sup> See *Riegle*, 656 F.2d at 878; *Kennedy*, 511 F.2d at 434, 436; *Mitchell*, 488 F.2d at 614.

<sup>82</sup> See *Mitchell*, 488 F.2d at 614.

<sup>83</sup> See *Goldwater v. Carter*, 617 F.2d 697, 702 (D.C. Cir. 1979), *vacated and remanded on other grounds*, 444 U.S. 996 (1979); *Kennedy*, 511 F.2d at 436.

<sup>84</sup> See *Riegle*, 656 F.2d at 878.

<sup>85</sup> 488 F.2d at 614.

<sup>86</sup> *Id.* at 613.

<sup>87</sup> *Id.* at 614.

upon" test represented an exceptionally permissive approach to legislator standing and was widely criticized by other circuit courts.<sup>88</sup> Not surprisingly, the D.C. Circuit soon rejected this approach itself.<sup>89</sup>

## 2. The Second Approach: *Kennedy v. Sampson* and Vote Nullification

The D.C. Circuit's second approach to legislator standing appeared in 1974 in *Kennedy v. Sampson*.<sup>90</sup> In *Kennedy*, the court granted standing to Senator Edward Kennedy to challenge the allegedly unconstitutional pocket veto<sup>91</sup> of the Family Practice of Medicine Act.<sup>92</sup> In deciding the case, the D.C. Circuit refused to rely on the "bears upon" test articulated in *Mitchell*, but instead emphasized the fact that the pocket veto amounted to a nullification of Senator Kennedy's vote.<sup>93</sup> In addition, unlike the *Coleman* decision, the court in *Kennedy* explicitly stated that an individual legislator can be granted standing with or without the concurrence of his fellow legislators.<sup>94</sup>

Three years later, the D.C. Circuit confirmed that vote nullification had replaced the "bears upon" test as the standard required for legislator standing in *Harrington v. Bush*.<sup>95</sup> In *Harrington*, Congressman Michael Harrington filed suit seeking a declaration that certain activities of the Central Intelligence Agency (the "CIA") were illegal and an injunc-

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<sup>88</sup> See *Harrington v. Schlesinger*, 528 F.2d 455, 459 (4th Cir. 1975) (refusing to follow the "bears upon" test articulated by the D.C. Circuit in *Mitchell* and instead following the approach of the Second Circuit in *Holtzman v. Schlesinger* to find that plaintiffs did not have standing); *Holtzman v. Schlesinger*, 484 F.2d 1307, 1315 (2d Cir. 1973) (holding that Congresswoman Holtzman did not have standing to sue for a declaration of illegality of executive action, and rejecting the notion that a declaration would affect her performance of legislative duties).

<sup>89</sup> See *Harrington v. Bush*, 553 F.2d 190, 209 (D.C. Cir. 1977) (denying standing to legislator plaintiffs and explicitly rejecting the "bears upon" test articulated in *Mitchell* as being inconsistent with the standing doctrine developed by the Supreme Court); *Kennedy*, 511 F.2d at 436 (holding that legislator plaintiff had standing but declining to rest its decision on *Mitchell* or the "bears upon" test).

<sup>90</sup> See 511 F.2d at 434, 436.

<sup>91</sup> The term "pocket veto" refers to the situation described in Article I, Section 7, Clause 2 of the Constitution where the President does not sign a bill presented by Congress. U.S. CONST. art. I, § 7, cl. 2. Ordinarily, a bill presented to the President becomes law if it is not signed or returned to Congress within ten days. *Id.* If, however, the adjournment of Congress within the ten-day period prevents the President from returning a bill, the bill does not become law. *Id.* The controversy in *Kennedy* arose because although Congress had adjourned for the Christmas holiday, the Senate had authorized the Secretary of the Senate to receive messages from the President during the adjournment. 511 F.2d at 432.

<sup>92</sup> *Kennedy*, 511 F.2d at 432-33.

<sup>93</sup> *Id.* at 436.

<sup>94</sup> *Id.* at 435.

<sup>95</sup> 553 F.2d at 209, 211.

tion to prevent the CIA from improperly utilizing special funding and reporting provisions under federal law.<sup>96</sup> In holding that the plaintiff lacked standing, the court emphasized that the alleged post-enactment illegality had not nullified Congressman Harrington's votes.<sup>97</sup> Specifically, the court stated that once a bill becomes law, any injury that results from its improper implementation falls equally on all citizens and thus constitutes a generalized grievance.<sup>98</sup>

The D.C. Circuit's 1979 decision in *Goldwater v. Carter* further refined this second approach to legislator standing.<sup>99</sup> In *Goldwater*, the court confirmed that for an injury to legislators to be cognizable for standing, it must amount to disenfranchisement, which the court defined as "a complete nullification or withdrawal of voting opportunity."<sup>100</sup> The court distinguished this type of injury from the harm resulting from the Executive's mere violation of a statute enacted through a legislator's vote because the legislator still has power to act through the legislative process to remedy the alleged abuses.<sup>101</sup> According to the court, for executive action to amount to disenfranchisement it must completely deprive the legislators of any legislative remedy.<sup>102</sup>

The D.C. Circuit's second approach to legislator standing, established in *Kennedy* and further refined by *Harrington* and *Goldwater*, also soon came under criticism.<sup>103</sup> In an influential article, Judge Carl McGowan, Chief Judge of the D.C. Circuit, criticized what he saw as contradictions in his court's approach to legislator standing.<sup>104</sup> On the one hand, the D.C. Circuit had stated in *Harrington* that there were no special standards for determining legislator standing.<sup>105</sup> But on the other hand, the court in *Goldwater* held that legislator plaintiffs must suffer an injury that his or her colleagues cannot redress through the legislative process.<sup>106</sup> Because no similar requirement existed for private

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<sup>96</sup> *Id.* at 193.

<sup>97</sup> *Id.* at 213.

<sup>98</sup> *Id.* at 213-14.

<sup>99</sup> 617 F.2d at 703 (holding that a group of Senators had standing to sue President Carter over his unilateral termination of the Mutual Defense Treaty with China, based on the fact he had deprived them of their alleged constitutional right to vote on the termination).

<sup>100</sup> *Id.* at 702.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> See Carl McGowan, *Congressmen in Court: The New Plaintiffs*, 15 GA. L. REV. 241, 254 (1981).

<sup>104</sup> *Id.*

<sup>105</sup> 553 F.2d at 204; McGowan, *supra* note 103, at 254.

<sup>106</sup> 617 F.2d at 702; McGowan, *supra* note 103, at 254.

plaintiffs, Judge McGowan argued that the court's doctrine of legislator standing was contradictory and should be revised.<sup>107</sup> His suggestions were soon realized as the D.C. Circuit abandoned its second approach to legislator standing and adopted what Judge McGowan called a "doctrine of equitable discretion."<sup>108</sup>

### 3. The Third Approach: *Riegle v. Federal Open Market Committee* and the Doctrine of Equitable Discretion

The D.C. Circuit first adopted the "doctrine of equitable discretion" in the 1981 case of *Riegle v. Federal Open Market Committee*.<sup>109</sup> At issue in *Riegle* was Senator Donald Riegle's challenge to the procedures that the Federal Reserve Act of 1976 established for appointing members to the Federal Open Market Committee.<sup>110</sup> Bothered by the contradictions that Judge McGowan had highlighted, the court in *Riegle* declared that it would first apply the traditional standing test—requiring injury to a legally protected interest, causation, and redressability—to legislative plaintiffs.<sup>111</sup> It would then examine whether any additional considerations arising by virtue of the plaintiff's status as a legislator counseled against adjudicating the dispute.<sup>112</sup> According to the court, the doctrine of equitable discretion prohibits courts from hearing a legislator's claim when there are other means available to the legislator to seek redress from his or her colleagues and there is the potential that a private plaintiff could bring a similar suit.<sup>113</sup> Applying this new two-pronged test, the court held that Senator Riegle satisfied the traditional requirements for standing<sup>114</sup> but then invoked the doctrine of equitable discretion to dismiss his claim.<sup>115</sup>

In reaching its conclusion in *Riegle*, the D.C. Circuit suggested that standing is not the doctrine best suited to deal with the separation of powers concerns arising in claims brought by legislators against the executive branch.<sup>116</sup> Instead, according to the court, the doctrine of equitable discretion addressed separation of powers concerns more appro-

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<sup>107</sup> McGowan, *supra* note 103, at 262.

<sup>108</sup> *Id.*; see *Riegle*, 656 F.2d at 878, 881.

<sup>109</sup> *Riegle*, 656 F.2d at 878, 881.

<sup>110</sup> *Id.* at 874.

<sup>111</sup> *Id.* at 877-78; see McGowan, *supra* note 103, at 254.

<sup>112</sup> *Riegle*, 656 F.2d at 878; see McGowan, *supra* note 103, at 262.

<sup>113</sup> *Riegle*, 656 F.2d at 881.

<sup>114</sup> *Id.* at 878-79.

<sup>115</sup> *Id.* at 878-79, 881-82.

<sup>116</sup> *Id.* at 880 (quoting McGowan, *supra* note 103, at 256).

priately.<sup>117</sup> Later, however, several members of the D.C. Circuit criticized the suggestion that separation of powers concerns were not embodied in the doctrine of standing.<sup>118</sup>

In two subsequent cases that followed the *Riegle* framework,<sup>119</sup> Judge Robert Bork and then-Judge Antonin Scalia wrote separately to express their beliefs that this approach reflects a misunderstanding of the doctrine of standing.<sup>120</sup> In the 1983 case of *Vander Jagt v. O'Neil*, Judge Bork stressed that recent Supreme Court cases had read "separation-of-powers concepts back into that part of the standing requirement which rests on a constitutional, rather than a prudential, foundation."<sup>121</sup> One year later, in *Moore v. U.S. House of Representatives*, Judge Scalia argued that separation of powers concerns are not left to the discretion of judges but rather are embodied in Article III.<sup>122</sup> Taking this argument one step further, he argued that the federal courts are constitutionally barred from granting standing to any legislator who asserts an institutional injury<sup>123</sup>—a conclusion Judge Bork soon reached himself.<sup>124</sup>

Despite these concerns, the D.C. Circuit continued to use the doctrine of equitable discretion in deciding legislator standing until the Supreme Court reexamined the issue.<sup>125</sup>

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<sup>117</sup> *Id.* at 881.

<sup>118</sup> See *Moore v. U.S. House of Representatives*, 733 F.2d 946, 956–57 (D.C. Cir. 1984) (Scalia, J., concurring); *Vander Jagt v. O'Neil*, 699 F.2d 1166, 1179 (D.C. Cir. 1983) (Bork, J., concurring).

<sup>119</sup> *Moore*, 733 F.2d at 956–57; *Vander Jagt*, 699 F.2d at 1179. In *Moore*, eighteen members of Congress challenged the constitutionality of the Tax Equity and Fiscal Responsibility Act of 1982. 733 F.2d at 948 (majority opinion). The court held that the plaintiffs had standing, but exercised its equitable discretion to dismiss the case. *Id.* In *Vander Jagt*, fourteen Republican members of the U.S. House of Representatives sued the Democratic leadership for allegedly providing them with fewer seats on House committees than they were proportionately owed. 699 F.2d at 1166 (majority opinion). The court, exercising its equitable discretion, dismissed the complaint based on separation of powers concerns. *Id.* at 1167.

<sup>120</sup> *Moore*, 733 F.2d at 956–57 (Scalia, J., concurring); *Vander Jagt*, 699 F.2d at 1179 (Bork, J., concurring).

<sup>121</sup> *Vander Jagt*, 699 F.2d at 1179 (Bork, J., concurring) (citing *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State*, 454 U.S. 464, 472 (1982)).

<sup>122</sup> *Moore*, 733 F.2d at 956–57 (Scalia, J., concurring).

<sup>123</sup> *Id.* at 959.

<sup>124</sup> *Barnes v. Kline*, 759 F.2d 21, 41 (D.C. Cir. 1985) (Bork, J., dissenting), *vacated as moot*, 479 U.S. 361 (1987) (arguing that the court should renounce outright legislator standing).

<sup>125</sup> See generally *Humphrey v. Baker*, 848 F.2d 211 (D.C. Cir. 1988) (exercising equitable discretion to hold that a suit brought by a Senator and members of the House of Representatives challenging the constitutionality of the Federal Salary Act of 1967 should be dismissed); *Melcher v. Fed. Open Mkt. Comm.*, 836 F.2d 561 (D.C. Cir. 1987) (exercising equitable discretion to hold that a suit brought by Senator John Melcher challenging the



C. Raines v. Byrd: *The U.S. Supreme Court Revisits Legislator Standing*

In 1997, the U.S. Supreme Court in *Raines v. Byrd* held that a group of legislators lacked standing to sue executive branch officials who were responsible for executing the provisions of the Line Item Veto Act (the "Act").<sup>126</sup> The Act provided that the President could cancel from appropriations bills any amount of discretionary spending or limited tax benefits provided that such cancellation reduces the federal budget deficit, does not impair any essential government functions, and does not harm the national interest.<sup>127</sup> The President was required to report any such "line item veto" to Congress within five calendar days.<sup>128</sup> The Act also explicitly declared that any member of Congress adversely affected by the Act could bring an action in the U.S. District Court for the District of Columbia.<sup>129</sup> The members of Congress who challenged the law argued that the Act was an unconstitutional delegation of power that would make their future votes on appropriations bills less effective.<sup>130</sup>

In holding that the legislators challenging the Act did not have standing, the Court focused on the nature of the alleged injury.<sup>131</sup> In particular, the Court explained that the injury was not personal in nature but rather was an injury to official power.<sup>132</sup> Furthermore, the Court attempted to distinguish the legislators' situation from the facts in *Coleman*.<sup>133</sup> Writing for the majority, Chief Justice Rehnquist stated that the Court's holding in *Coleman* stood, at most, for "the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified."<sup>134</sup> The plaintiffs in *Raines* had not alleged any vote nullification but only that their future

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procedures for selecting members of the Federal Open Market Committee should be dismissed).

<sup>126</sup> *Raines*, 521 U.S. at 830.

<sup>127</sup> Line Item Veto Act of 1996, Pub. L. No. 104-130, § 2, 110 Stat. 1200, 1200-11, *invalidated by* Clinton v. City of New York, 524 U.S. 417 (1998).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* § 3(a).

<sup>130</sup> *Raines*, 521 U.S. at 816.

<sup>131</sup> *See id.* at 821.

<sup>132</sup> *Id.* (noting that the claimed injury runs with the member's seat, which he or she holds as a trustee for his or her constituents, not as a prerogative of personal power).

<sup>133</sup> *Id.* at 823-24.

<sup>134</sup> *Id.* at 823.

votes would be less effective due to the provisions of the Act.<sup>135</sup> According to the Court, unlike vote nullification, this injury is "wholly abstract and widely dispersed."<sup>136</sup> The Court also explained that granting standing would be inconsistent with historical precedent and cited past disputes between the legislative and executive branches in which the federal courts were not involved.<sup>137</sup>

In addition to the holding that the legislator plaintiffs lacked standing, several other aspects of the *Raines* decision are notable.<sup>138</sup> First, the Court found that the plaintiffs lacked standing despite specific language in the Act purporting to grant standing to any member of Congress that the Act adversely affected.<sup>139</sup> The Court acknowledged that although this might remove any prudential barriers to standing, it could not erase the Article III standing requirements and therefore could not convert a generalized grievance into an injury sufficient for standing.<sup>140</sup>

Other portions of the *Raines* decision are more notable for what they do not decide.<sup>141</sup> For example, the Court stated that it attached some importance to the fact that the respective houses of Congress had not authorized the plaintiffs to bring their suit.<sup>142</sup> The majority also noted that its decision does not foreclose a constitutional challenge to the Act by someone who has suffered a judicially cognizable injury.<sup>143</sup> In fact, the Act was later successfully challenged in 1998 in *Clinton v. City of New York*, where the Court held it unconstitutional.<sup>144</sup> These statements suggest that these factors played a role in the Court's decision and that, had these circumstances been different, the Court might have granted standing.<sup>145</sup>

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<sup>135</sup> *Raines*, 521 U.S. at 825.

<sup>136</sup> *Id.* at 829.

<sup>137</sup> *Id.* at 826–28.

<sup>138</sup> *See id.* at 829.

<sup>139</sup> Line Item Veto Act of 1996, Pub. L. No. 104-130, § 3, 110 Stat. 1200, 1211, *invalidated by* *Clinton v. City of New York*, 524 U.S. 417 (1998); *Raines*, 521 U.S. at 815–16.

<sup>140</sup> *See Raines*, 521 U.S. at 820 n.3; *see also Lujan*, 504 U.S. at 576–77 (explaining that Congress cannot convert a generalized grievance into injury sufficient for standing); Scalia, *supra* note 19, at 886 (stating that core constitutional standing requirements limit Congress's ability to convert generalized benefits into legal rights).

<sup>141</sup> *See Raines*, 521 U.S. at 824 n.8, 829.

<sup>142</sup> *Id.* at 829.

<sup>143</sup> *Id.*

<sup>144</sup> 524 U.S. at 421.

<sup>145</sup> *See Raines*, 521 U.S. at 829. Even if the entire Congress had brought this suit, the injury alleged would still fall short of vote nullification and therefore would be insufficient for standing. *See id.* at 823. For this reason, the Court's statement that the plaintiffs' suit had not been authorized by their respective houses is probably best read as an additional

Some language in *Raines*, on the other hand, suggests that the Court might never consider a claim by federal legislators sufficient for standing.<sup>146</sup> In a footnote, Chief Justice Rehnquist acknowledged that the facts in *Coleman* might be distinguishable from *Raines* on grounds other than the lack of vote nullification, although he refused to decide as much.<sup>147</sup> First, in *Coleman*, the Kansas Supreme Court had already treated the senators' interest in their votes as a basis for entertaining the federal question before the case came into the federal courts.<sup>148</sup> Second, *Coleman* involved state legislators and therefore arguably did not raise the same separation of powers concerns that would be at issue in a suit by federal legislators.<sup>149</sup> The fact that the Court acknowledged these differences, albeit in a footnote and while refusing to decide on them, raises questions about whether federal legislators can ever have standing to sue for an institutional injury.<sup>150</sup>

Not surprisingly, because the Court's decision in *Raines* is open to various interpretations, it has been the subject of much criticism and debate.<sup>151</sup> Some authors have argued that reading *Raines* as requiring

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reason why standing was inappropriate. See *id.*; see also *Baird v. Norton*, 266 F.3d 408, 412 (6th Cir. 2001) (holding that even though legislators alleged an injury of vote nullification, they lacked standing because they did not constitute a group whose votes would have been sufficient to defeat the legislation they alleged was improperly passed). The existence of private plaintiffs, however, would not be an additional reason to deny standing, and is therefore probably best read to suggest that legislator standing might be appropriate where there is no potential private plaintiff. See *Arend & Lotrionte*, *supra* note 6, at 260-61 (noting that the Court's statement about the existence of private litigants emphasized the narrowness of the *Raines* decision). But see *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974) ("The assumption that if [plaintiffs] have no standing to sue, no one would have standing, is not a reason to find standing." (citing *United States v. Richardson*, 418 U.S. 166, 179 (1974))); *Richardson*, 418 U.S. at 179 ("[T]he absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed . . . ultimately to the political process.").

<sup>146</sup> See *Raines*, 521 U.S. at 824 n.8.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* (citing *Coleman*, 307 U.S. at 446).

<sup>149</sup> *Id.* But see *id.* at 843 (Breyer, J., dissenting) ("While I recognize the differences between state and federal legislators, I do not believe that those differences would be determinative here . . .").

<sup>150</sup> See *id.* at 824 n.8 (majority opinion); see also *Arend & Lotrionte*, *supra* note 6, at 257 (arguing that the Court in *Raines* refused to decide the issue of whether federal legislators could ever have standing for institutional injuries).

<sup>151</sup> See *Alexander*, *supra* note 6, at 698 (arguing that the *Raines* Court should have recognized diminution of legislative power as an injury sufficient for standing). See generally *Arend & Lotrionte*, *supra* note 6 (arguing that, after *Raines*, separation of powers concerns bar federal legislators from ever having standing to sue for an institutional injury); Note, *Standing in the Way of Separation of Powers: The Consequences of Raines v. Byrd*, 112 HARV. L. REV. 1741 (1999) [hereinafter *Standing in the Way*] (acknowledging that *Raines* restricts legislators' access to the federal courts, but arguing that this actually will serve to weaken

legislators to assert a personal—as opposed to official—injury is an unsustainable interpretation.<sup>152</sup> Such a standard, they contend, is inconsistent with the Court's traditional interpretation of the "personal injury" requirement for standing.<sup>153</sup> Furthermore, such a standard is inconsistent with the Court's holding in *Coleman* and the Court's refusal to overrule that case indicates that *Raines* cannot be understood as barring standing whenever the alleged injury is to an official interest.<sup>154</sup>

Attempts to distinguish the holding in *Raines* from *Coleman* on the grounds that the former involved federal legislators have also been criticized.<sup>155</sup> Although the majority in *Raines* suggested in a footnote that *Coleman* might raise less serious separation of powers concerns because it involved state legislators,<sup>156</sup> Justice Breyer argued in his dissenting opinion that this distinction is not convincing.<sup>157</sup> In any event, the Court's refusal to rely on the distinction between fed-

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rather than strengthen the separation of powers); David J. Weiner, Note, *The New Law of Legislative Standing*, 54 STAN. L. REV. 205 (2001) (arguing that the *Raines* decision is harmful to the separation of powers and that it reflects underlying problems with the doctrine of standing).

<sup>152</sup> See *Standing in the Way*, *supra* note 151, at 1746–47; *The Supreme Court, 1996 Term—Leading Cases*, 111 HARV. L. REV. 197, 222 n.47 (1997) [hereinafter *Leading Cases*].

<sup>153</sup> See, e.g., *Standing in the Way*, *supra* note 151, at 1747 ("Commentators . . . agree that '[t]he allowance of suit in an official capacity is commonplace in American jurisprudence.'" (quoting *TRIBE*, *supra* note 23, § 3-20, at 152 n.53)); see also *Leading Cases*, *supra* note 152, at 222 n.47 (noting that prior to *Raines*, "the Court primarily had employed the personal injury requirement to ensure that the alleged injury was particularized, and not to distinguish between personal- and official-capacity injuries").

<sup>154</sup> See *Standing in the Way*, *supra* note 151, at 1746 n.38 (noting that this interpretation is in tension with *Coleman* because that case involved official-capacity injury); *Leading Cases*, *supra* note 152, at 222 (stating that such a requirement is facially incompatible with *Coleman*).

<sup>155</sup> See *Raines*, 521 U.S. at 843 (Breyer, J., dissenting) (arguing that the distinction between state and federal legislators is not convincing); *Leading Cases*, *supra* note 152, at 224 n.55 (noting that if *Coleman* is distinguishable on these grounds, the Court's failure to decide as much would represent a misapplication of the rule against deciding constitutional questions if a case can be decided on other grounds (citing *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346–47 (1936) (Brandeis, J., concurring))).

<sup>156</sup> *Raines*, 521 U.S. at 824 n.8 (acknowledging, though not deciding, that *Coleman* is distinguishable on the grounds that it concerned state legislators and therefore similar separation of powers concerns were not present).

<sup>157</sup> *Id.* at 843 (Breyer, J., dissenting) ("While I recognize the existence of potential differences between state and federal legislators, I do not believe that those differences would be determinative here . . . given the Constitution's somewhat comparable concerns for state authority . . .").

eral and state legislators indicates that it was not distinguishing *Coleman* on these grounds.<sup>158</sup>

Although the Court's decision in *Raines* did not decide explicitly when, if ever, federal legislators have standing, courts and commentators have presented a variety of possibilities.<sup>159</sup> What qualifies as vote nullification, and whether any other injury can be sufficient, are important questions that remain unanswered and are particularly relevant in evaluating how presidential signing statements fit into the doctrine of legislator standing.<sup>160</sup>

### III. PRESIDENTIAL SIGNING STATEMENTS AND THE CALL FOR A LEGISLATIVE RESPONSE

Presidential signing statements have gained notoriety recently due to their frequent use by President George W. Bush.<sup>161</sup> Signing statements are pronouncements issued by a President at the time a congressional enactment is signed.<sup>162</sup> They serve a variety of functions that range from merely explaining the President's reasons for signing a bill into law to expressing the President's concern over particular parts of

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<sup>158</sup> See *Raines*, 521 U.S. at 824 n.8 (stating that because *Coleman* could be distinguished on the grounds that it involved complete nullification, it was not necessary to decide whether it could be distinguished in other ways).

<sup>159</sup> *Id.* at 824-26; see *Campbell v. Clinton*, 203 F.3d 19, 22-23 (D.C. Cir. 2000); Arend & Lotrionte, *supra* note 6, at 277-81 (arguing that separation of powers concerns bar federal legislators from ever having standing to sue for an institutional injury). In *Campbell*, the D.C. Circuit held that vote nullification sufficient to give legislators standing applies in only those rare situations like *Coleman* where no legislative remedies exist. *Campbell*, 203 F.3d at 22-23. The court explained that *Coleman* was a unique case of vote nullification because once the amendment at issue was deemed ratified, there was nothing that the Kansas legislature could have done to reverse that position. *Id.* But see *id.* at 32 (Randolph, J., concurring) (arguing that the possibility of a future legislative remedy has no bearing on whether a vote has been nullified and stating that "[t]o say that your vote was not nullified because you can vote for other legislation in the future is like saying you did not lose yesterday's battle because you can fight again tomorrow"); *Chenoweth v. Clinton*, 181 F.3d 112, 116-17 (D.C. Cir. 1999) (stating that the level of nullification at issue in *Kennedy* could survive the Court's holding in *Raines*).

<sup>160</sup> See Meyer, *supra* note 6, at 123 (arguing that a President's refusal to enforce the law is tantamount to nullification and that legislators should be granted standing in these circumstances); Exploring International Law, <http://explore.georgetown.edu/blogs/?id=17051> (July 25, 2006, 16:14 EST) (arguing that a President's complete disregard for a statute might qualify as vote nullification).

<sup>161</sup> Charlie Savage, *Bush Challenges Hundreds of Laws; President Cites Powers of His Office*, BOSTON GLOBE, Apr. 30, 2006, at A1; Editorial, *Veto? Who Needs a Veto?*, N.Y. TIMES, May 5, 2006, at A22; Editorial, *A White House Power Grab*, S.F. CHRON., June 12, 2006, at B6.

<sup>162</sup> Phillip J. Cooper, *George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statements*, 35 PRESIDENTIAL STUD. Q. 515, 516 (2005).

the legislation.<sup>163</sup> Signing statements have been particularly controversial when they have been used to provide the President's interpretation of the law, to announce constitutional limits on the implementation of some of its provisions, or to instruct executive branch officials on how to administer the law in an acceptable manner.<sup>164</sup>

This Part explains some of the controversy surrounding signing statements.<sup>165</sup> It begins by looking at the origins of the practice and its increased use in recent years.<sup>166</sup> It next examines President Bush's prolific use of signing statements and the constitutional concerns that they raise.<sup>167</sup> It then presents some of the responses to the President's use of signing statements, including calls to challenge the legality of such statements.<sup>168</sup> Finally, this Part concludes by exploring some of the unique questions about legislator standing that arise in the context of presidential signing statements.<sup>169</sup>

### A. *The History of the Presidential Use of Signing Statements*

The signing statement is not the creation of the Bush administration; in fact, the practice has been used since at least the time of President James Monroe.<sup>170</sup> Numerous Presidents since Monroe have issued signing statements to identify their disagreements with Congress but overall the practice had been used sparingly until recent presidencies.<sup>171</sup> Furthermore, Presidents generally have not gone so far as to denounce provisions in the bills they have signed.<sup>172</sup>

<sup>163</sup> PHILLIP J. COOPER, *BY ORDER OF THE PRESIDENT: THE USE & ABUSE OF EXECUTIVE DIRECT ACTION* 201 (2002); NEIL KINKOPF, *SIGNING STATEMENTS AND THE PRESIDENT'S AUTHORITY TO REFUSE TO ENFORCE THE LAW* 2 (2006), <http://www.acslaw.org/files/KinkopfSigning%20Statements%20and%20President's%20Authority.pdf>.

<sup>164</sup> COOPER, *supra* note 163, at 201; Cooper, *supra* note 162, at 517.

<sup>165</sup> See *infra* notes 170–222 and accompanying text.

<sup>166</sup> See *infra* notes 170–181 and accompanying text.

<sup>167</sup> See *infra* notes 182–199 and accompanying text.

<sup>168</sup> See *infra* notes 200–215 and accompanying text.

<sup>169</sup> See *infra* notes 216–222 and accompanying text.

<sup>170</sup> AM. BAR ASS'N, *TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE* 7 (2006) [hereinafter ABA REPORT], available at [http://www.abanet.org/op/signingstatements/aba\\_final\\_signing\\_statements\\_recommendation-report\\_7-24-06.pdf](http://www.abanet.org/op/signingstatements/aba_final_signing_statements_recommendation-report_7-24-06.pdf) (describing how President Monroe, after signing a bill that prescribed the method by which the President should select military officers, issued a statement that the President alone bore the constitutional responsibility for appointing military officers).

<sup>171</sup> See *id.* at 7–10 (describing the occasional use of signing statements by fourteen different Presidents prior to the Reagan administration).

<sup>172</sup> *Id.* at 7 (describing how Presidents used signing statements to identify their differences with the Congress throughout the nineteenth century, but noting that "Presidents seemed to shy away from statements denouncing provisions in bills they signed"); CHRIS-

The more frequent and controversial use of signing statements began with the Ronald Reagan administration.<sup>173</sup> President Reagan issued seventy-one signing statements during his eight years in office.<sup>174</sup> Under the direction of Attorney General Edwin Meese III, the Reagan administration issued signing statements designed to provide the President's interpretation of particular statutes and to express any constitutional concerns.<sup>175</sup> More importantly, the signing statements instructed agency heads to execute statutes in manners consistent with the Constitution and therefore not to enforce provisions the President interpreted to be unconstitutional.<sup>176</sup> The administrations of George H.W. Bush and Bill Clinton continued President Reagan's approach to signing statements and used them with increased frequency, Bush issuing 146 in his four years in office and Clinton issuing 105 during his two terms.<sup>177</sup>

This more recent approach to the use of signing statements is particularly controversial because it allows the President to avoid vetoing a law that he or she believes is unconstitutional.<sup>178</sup> By simply declaring that a portion of the law is unconstitutional and instructing agencies not to execute it, the President exercises a kind of "line-item veto."<sup>179</sup> The exercise of a line-item veto raises separation of powers concerns because it involves legislative action that is not subject to the constitutional requirements of bicameralism and presentment.<sup>180</sup> For this very reason, the Supreme Court declared the Line Item Veto Act of 1996 unconstitutional in 1998 in *Clinton v. City of New York*.<sup>181</sup>

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TOPHER N. MAY, PRESIDENTIAL DEFIANCE OF "UNCONSTITUTIONAL" LAWS: REVIVING THE ROYAL PREROGATIVE 76-80 (1998) (counting only twelve signing statements prior to 1981 in which a President expressed his intention to disregard a statute).

<sup>173</sup> ABA REPORT, *supra* note 170, at 10; COOPER, *supra* note 163, at 201; Cooper, *supra* note 162, at 517.

<sup>174</sup> ABA REPORT, *supra* note 170, at 11.

<sup>175</sup> COOPER, *supra* note 163, at 202; Cooper, *supra* note 162, at 517.

<sup>176</sup> COOPER, *supra* note 163, at 202; Cooper, *supra* note 162, at 517.

<sup>177</sup> Christopher S. Kelley, Professor, Miami Univ., A Comparative Look at the Constitutional Signing Statement: The Case of Bush and Clinton, Paper Presented at the 61st Annual Meeting of the Midwest Political Science Association 18 (Apr. 3-6, 2003), available at <http://mpsa.indiana.edu/conf2003papers/1031858822.pdf>.

<sup>178</sup> See COOPER, *supra* note 163, at 203-06; Cooper, *supra* note 162, at 517.

<sup>179</sup> COOPER, *supra* note 163, at 203-06; Cooper, *supra* note 162, at 517.

<sup>180</sup> See U.S. CONST. art. I, § 7, cl. 2; see also ABA REPORT, *supra* note 170, at 18. Bicameralism refers to the requirement that both the U.S. Senate and House of Representatives pass a bill before it becomes law. See U.S. CONST. art. I, § 7, cl. 2. Presentment refers to the additional requirement that before becoming law, all bills must be presented to, and signed by, the President. See *id.*

<sup>181</sup> 524 U.S. 417, 421 (1998); see also ABA REPORT, *supra* note 170, at 18.

### B. *The Use of Signing Statements by George W. Bush*

President Bush's use of signing statements has generated criticism due both to the frequency with which he has used them and to the broad claims of presidential authority he has made through them.<sup>182</sup> President Bush issued 108 signing statements containing 505 separate constitutional challenges in his first term<sup>183</sup> and, as of May 2006, he has challenged over 750 statutory provisions in all.<sup>184</sup> Furthermore, President Bush has used signing statements to challenge numerous congressional acts without actually vetoing any laws.<sup>185</sup> By not employing his veto power, the President does not risk the possibility of a congressional override but still prevents provisions of those laws from going into effect through the use of signing statements.<sup>186</sup>

President Bush's use of signing statements has also gained attention due to the wide array of legislation he has challenged.<sup>187</sup> Through signing statements, President Bush has claimed the authority to ignore numerous provisions of bills such as requirements that the executive branch report to Congress on the use of Patriot Act authority,<sup>188</sup> whistleblower protections for nuclear regulatory officials,<sup>189</sup> and affirmative

<sup>182</sup> Cooper, *supra* note 162, at 521; Savage, *supra* note 161.

<sup>183</sup> Cooper, *supra* note 162, at 521.

<sup>184</sup> Savage, *supra* note 161.

<sup>185</sup> *Id.* President Bush has since vetoed his first piece of legislation, the Stem Cell Research Enhancement Act of 2005. 42 WEEKLY COMP. PRES. DOC. 1365 (July 19, 2006), available at <http://www.gpoaccess.gov/wcomp/v42no29.html>.

<sup>186</sup> See COOPER, *supra* note 163, at 223; see also *Senate Hearing on Presidential Signing Statements*, *supra* note 4 (statement of Sen. Patrick Leahy, Ranking Member, S. Comm. on the Judiciary) (accusing the President of using signing statements "as a de facto line-item veto to cherry-pick which laws he will enforce").

<sup>187</sup> See ABA REPORT, *supra* note 170, at 15-16; Savage, *supra* note 161.

<sup>188</sup> Compare USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, §§ 106A, 119, 120 Stat. 192, 200-02, 219-21 (2006) (requiring the Inspector General of the Department of Justice to conduct audits on the Department's use of Patriot Act provisions and report the results of these audits to Congress), with Statement on Signing the USA PATRIOT Improvement and Reauthorization Act of 2005, 42 WEEKLY COMP. PRES. DOC. 425 (Mar. 9, 2006) [hereinafter Patriot Act Signing Statement] ("The executive branch shall construe the provisions of H.R. 3199 that call for furnishing information to entities outside the executive branch, such as sections 106A and 119, in a manner consistent with the President's constitutional authority to supervise the unitary executive branch and to withhold information the disclosure of which could impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties.").

<sup>189</sup> Compare Energy Policy Act of 2005, Pub. L. No. 109-58, § 629, 119 Stat. 594, 785 (codified as amended at 42 U.S.C.A. § 5851(a)(2) (West Supp. 2006)) (providing whistleblower protection for contractors and subcontractors of the Nuclear Regulatory Commission and Department of Energy), with Statement on Signing the Energy Policy Act of 2005, 41 WEEKLY COMP. PRES. DOC. 1267 (Aug. 8, 2005) [hereinafter Energy Policy Act Signing



action provisions.<sup>190</sup> The signing statement that has generated perhaps the most attention was issued in response to the McCain Amendment, which forbids U.S. officials from using cruel, inhuman, or degrading treatment on prisoners.<sup>191</sup> The McCain Amendment,<sup>192</sup> also known as the Detainee Treatment Act of 2005, mandates that detainees not be subject to cruel, inhuman, or degrading treatment.<sup>193</sup> In response to this clear directive, President Bush issued a signing statement asserting:

The executive branch shall construe [the McCain Amendment], relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power, which will assist in achieving the shared objective of the Congress and the President, evidenced in [the McCain Amendment], of protecting the American people from further terrorist attacks.<sup>194</sup>

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Statement] ("The executive branch shall construe the amendments to section 211 of the Energy Reorganization Act made by section 629 of the Act, as they relate to dissemination of official information by employees of the Department of Energy and the Nuclear Regulatory Commission, in a manner consistent with the President's constitutional authority to supervise the unitary executive branch.").

<sup>190</sup> Compare Export-Import Bank Reauthorization Act of 2002, Pub. L. No. 107-189, § 7(b), 116 Stat. 698, 700 (codified as amended at 12 U.S.C. § 635(b)(1)(E)(iii)(II) (Supp. III 2003)) (requiring an emphasis on conducting outreach and increasing loans to socially and economically disadvantaged small business concerns, and small business concerns owned by women), with Statement on Signing the Export-Import Bank Reauthorization Act of 2002, 1 PUB. PAPERS 989 (June 14, 2002) [hereinafter Export-Import Bank Reauthorization Act Signing Statement] ("The executive branch shall carry out section 7(b) of the bill, which relates to certain small businesses, in a manner consistent with the requirements of equal protection under the Due Process Clause of the Fifth Amendment to the Constitution.").

<sup>191</sup> Joint Statement, Sen. John W. Warner, Chairman, S. Armed Service Comm., and Sen. John McCain, Presidential Signing Statement on Detainee Provisions (Jan. 4, 2006), <http://warner.senate.gov/pressoffice/statements/20060104.htm>; Charlie Savage, *Bush Could Bypass New Torture Ban: Waiver Right Is Reserved*, BOSTON GLOBE, Jan. 4, 2006, at A1; Editorial, *Unchecked Abuse*, WASH. POST, Jan. 11, 2006, at A20.

<sup>192</sup> The law was passed as part of the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act of 2006, Pub. L. No. 109-148, 119 Stat. 2680 (codified in scattered sections of 42 U.S.C.A.).

<sup>193</sup> Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1003(a), 119 Stat. 2680, 2739 (codified as amended at 42 U.S.C.A. § 2000dd (West 2001 & Supp. 2006)).

<sup>194</sup> Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act of 2006, 41 WEEKLY COMP. PRES. DOC. 1918 (Dec. 30, 2005) [hereinafter Emergency Supplemental Appropriations Act Signing Statement].

The broad language of this statement suggests that the President can ignore the provisions of the McCain Amendment because they impinge on his constitutional authority as head of the "unitary executive branch" and as the Commander-in-Chief, and furthermore, that his actions in this area are outside the scope of judicial review.<sup>195</sup>

Aside from purporting to ignore major provisions of various laws, President Bush's signing statements have also been criticized for adopting broad interpretations of executive power.<sup>196</sup> Two of the most commonly used objections in the President's signing statements—that provisions of a law interfere with his power to supervise the unitary executive branch or interfere with his exclusive power over foreign affairs<sup>197</sup>—are far from widely accepted legal views on executive power.<sup>198</sup> Furthermore, refusing to enforce provisions of a law because they conflict with the President's own broad views of executive power is a use of signing statements not employed by previous Presidents.<sup>199</sup>

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<sup>195</sup> See *id.*

<sup>196</sup> Cooper, *supra* note 162, at 521.

<sup>197</sup> *Id.* at 522.

<sup>198</sup> See *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004); *Humphrey's Ex'r v. United States*, 295 U.S. 602, 628–29 (1935). Several Supreme Court cases upholding the constitutionality of independent agencies and independent executive officials cast doubt on the theory of a unitary executive. See *Humphrey's Ex'r*, 295 U.S. at 628–29 (upholding restrictions on the President's power to remove federal trade commissioners because the agency exercised quasi-legislative and quasi-judicial authority); see also *Morrison v. Olson*, 487 U.S. 654, 691–93 (1988) (upholding restrictions on the President's power to remove the Independent Counsel because these restrictions did not interfere with the President's ability to fulfill his or her constitutional duties). For criticism of the theory of a unitary executive branch generally, see Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123 (1994) (arguing that we must accept some congressional efforts at regulating presidential lawmaking); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994) (arguing that historical evidence indicates that the Framers did not intend to create a clear executive hierarchy with the President at the top). Recent Supreme Court decisions have also cast into doubt the theory of exclusive executive power in foreign affairs. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2773–74 (2006) (noting that the Constitution vests the powers over war in both the President and Congress); *Hamdi*, 542 U.S. at 536 (stating that a state of war is not a "blank check" for the President).

<sup>199</sup> See Memorandum from Walter Dellinger, Assistant Attorney Gen., to Abner J. Mikva, Counsel to the President (Nov. 2, 1994), available at <http://www.usdoj.gov/olc/nonexecut.htm> (arguing that a President is obligated to enforce a statutory provision, regardless of his own personal beliefs as to its constitutionality, if he believes that the Supreme Court would sustain that particular provision as constitutional).

### C. *The Response to George W. Bush's Use of Signing Statements*

President Bush's prolific use of signing statements has drawn congressional attention and calls for action.<sup>200</sup> Shortly after newspaper reports detailed the President's use of this device,<sup>201</sup> legislation was introduced into the U.S. House of Representatives calling for various responses.<sup>202</sup> The U.S. Senate Committee on the Judiciary also conducted hearings on the issue,<sup>203</sup> and the American Bar Association (the "ABA") convened a task force to issue recommendations.<sup>204</sup> Both the ABA Task Force and individuals testifying before the Senate Judiciary Committee called upon Congress to enact legislation granting itself standing to sue the President over signing statements.<sup>205</sup>

Although much of the focus on President Bush's use of signing statements has been critical of the device, many have also voiced support for the use of signing statements in appropriate circumstances.<sup>206</sup> A group of legal scholars (all of whom have served in the Office of Legal Counsel) responded to the ABA's recommendations by arguing that signing statements are sometimes necessary and even a positive tool for maintaining checks and balances in government.<sup>207</sup> These scholars point out that the President has a duty to uphold the Constitution, and therefore if a law passed by Congress violates the Constitution, the President has a duty not to enforce it.<sup>208</sup> Furthermore, they argue, when the President refuses to enforce a law, signing statements inform Congress and the public of that decision and thereby make the President's execution of the laws more transparent.<sup>209</sup> Some have also ar-

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<sup>200</sup> ABA REPORT, *supra* note 170, at 24-26; Charlie Savage, *Hearing Vowed on Bush's Powers: Senator Questions Bypassing of Laws*, BOSTON GLOBE, May 3, 2006, at A1.

<sup>201</sup> Savage, *supra* note 161.

<sup>202</sup> H.R. 5486, 109th Cong. § 1 (2006) (proposing to cut off all funding for the production, publication, and dissemination of signing statements, and directing federal agencies not to consider signing statements when determining how to implement a law); H.R.J. Res. 89, 109th Cong. § 1(a) (2006) (proposing to require the President to report to Congress any time he or she makes the determination not to enforce a particular provision of law).

<sup>203</sup> *Senate Hearing on Presidential Signing Statements*, *supra* note 4.

<sup>204</sup> ABA REPORT, *supra* note 170, at 3.

<sup>205</sup> *Senate Hearing on Presidential Signing Statements*, *supra* note 4 (testimony of Bruce Fein and Professor Charles Ogletree); ABA REPORT, *supra* note 170, at 25.

<sup>206</sup> Posting of David Barron et al. to ACSblog, <http://www.acsblog.org/cat-separation-of-powers.html> (July 31, 2006, 15:38 EST).

<sup>207</sup> *Id.* Although the authors of this posting write in support of signing statements in some circumstances, they are also critical of George W. Bush's use of the device. *Id.* They believe the real concern is the broad claims of authority that the Bush administration has made, and that the ABA's focus on signing statements misses this bigger concern. *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

gued that because they express the President's interpretation of a law, signing statements are the equivalent of legislative history and should be given the same weight by courts when interpreting statutes.<sup>210</sup>

Despite some support for signing statements, Senator Arlen Specter, acting on the advice of the ABA Task Force, introduced a bill into the U.S. Senate on July 26, 2006 purporting to grant standing to members of Congress to challenge signing statements.<sup>211</sup> The goal of this legislation is to allow a congressional lawsuit against the President to be heard in federal court where the President can be ordered to enforce a statute that he has thus far refused to enforce.<sup>212</sup> Potentially, one U.S. Supreme Court decision could put to rest the issue of the constitutionality of signing statements.<sup>213</sup> Therefore, instead of seeking to challenge each of President Bush's signing statements, congressional members may hope to obtain one ruling from the Court that affirms their position.<sup>214</sup> Whatever the arguments as to the merits of such a suit, the pro-

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<sup>210</sup> See ABA REPORT, *supra* note 170, at 10 (noting that Ronald Reagan's Attorney General Edwin Meese arranged to have signing statements published along with legislative history in the United States Code Congressional and Administrative News). At least two current Supreme Court Justices have also suggested that signing statements are worthy of the same interpretive weight as legislative history. See *Hamdan*, 126 S. Ct. at 2816 (Scalia, J., dissenting) (pointing out that the majority neglected to include the President's signing statement in its discussion of the legislative history of a statute); Memorandum from Samuel A. Alito, Jr., Deputy Assistant Attorney Gen., Office of Legal Counsel, to The Litigation Strategy Working Group 1 (Feb. 5, 1986), <http://www.archives.gov/news/samuel-alito/accession-060-89-269/Acc060-89-269-box6-SG-LSWG-AlitotoLSWG-Feb1986.pdf> (presenting a strategy to ensure that presidential signing statements are given equal consideration in interpreting legislation). For a discussion of the appropriate level of deference presidential signing statements should receive generally, see Note, *Context-Sensitive Deference to Presidential Signing Statements*, 120 HARV. L. REV. 597 (2006) (arguing that "[c]ourts should adopt a flexible approach to the amount of deference accorded signing statements by applying doctrinal tools developed in the areas of statutory interpretation and administrative law").

<sup>211</sup> Presidential Signing Statements Act of 2006, S. 3731, 109th Cong. § 5 (2006). Section 5, entitled, "Congressional Standing to Obtain Declaratory Judgment," states:

Any court of the United States, upon the filing of an appropriate pleading by the United States Senate, through the Office of Senate Legal Counsel, and/or the United States House of Representatives, through the Office of the General Counsel for the United States House of Representatives, may declare the legality of any presidential signing statement, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

*Id.*

<sup>212</sup> *Senate Hearing on Presidential Signing Statements*, *supra* note 4 (testimony of Bruce Fein).

<sup>213</sup> ABA REPORT, *supra* note 170, at 26.

<sup>214</sup> *Senate Hearing on Presidential Signing Statements*, *supra* note 4 (statement of Sen. Patrick Leahy, Ranking Member, S. Comm. on the Judiciary) (arguing that President Bush's

posal raises serious questions about whether signing statements sufficiently injure federal legislators to qualify them for Article III standing in the federal courts.<sup>215</sup>

#### D. *The Unique Problems Posed by Challenging Signing Statements*

Legislators hoping to challenge the legality of presidential signing statements would have to overcome several major obstacles, one of the most difficult being to demonstrate an injury sufficient for standing.<sup>216</sup> Signing statements present unique questions about stand-

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use of signing statements to "cherry-pick" which laws he will enforce is unconstitutional); ABA REPORT, *supra* note 170, at 26.

<sup>215</sup> See *Raines v. Byrd*, 521 U.S. 811, 823 (1997); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576-77 (1992); *Coleman v. Miller*, 307 U.S. 433, 438 (1939).

<sup>216</sup> *Senate Hearing on Presidential Signing Statements*, *supra* note 4 (testimony of Professor Nicholas Rosenkranz) (stating that standing doctrine is notoriously complicated, and that Congress's ability to confer standing on itself is a vexed question); *id.* (testimony of Professor Christopher Yoo) (stating that in his opinion Congress lacks constitutional authority to statutorily confer standing on itself to challenge presidential signing statements).

Any challenge that legislators bring will also have to satisfy other justiciability requirements; in particular, it must be shown that the case is ripe for judicial resolution and that it does not present a political question. See *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967) (stating that "it is fair to say that [the] basic rationale [of ripeness] is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties"); *Baker v. Carr*, 369 U.S. 186, 217 (1962) (listing six criteria for determining whether a case presents a nonjusticiable political question). For a challenge to a signing statement to be ripe for judicial resolution, the President must have actually followed through with the expressed intentions in the signing statement. See *Abbott*, 387 U.S. at 148-49; see also CHEMERINSKY, *supra* note 23, at 102 (explaining that the ripeness doctrine seeks to exclude from judicial review claims based on an injury that is speculative and may never actually occur); *TRIBE*, *supra* note 23, at 390 (stating that ripeness is frequently an issue in preenforcement challenges where there is some doubt as to whether the law in question will actually be applied to the plaintiffs). For example, if Congress chooses to challenge the President's signing statement issued in response to the USA PATRIOT Improvement and Reauthorization Act, it would pose a serious ripeness problem. See *Patriot Act Signing Statement*, *supra* note 188. A challenge to the President's declaration that he has the authority to withhold information from Congress does not present an issue that is ripe. See *Abbott*, 387 U.S. at 148-49. If, however, the President goes beyond simply claiming this authority and actually does withhold information from Congress, then the case would be ripe for judicial resolution. See *id.* When discussing challenges to signing statements in the remainder of this Note, it is assumed that the President has actually acted on or followed through with the expressed intent in a signing statement, thus ensuring that a challenge is ripe for judicial resolution. See *id.*

In addition to being ripe, a challenge to signing statements must not embody the characteristics of a political question to avoid being dismissed as nonjusticiable. See *Baker*, 369 U.S. at 217 (listing the following criteria as indicative of a political question: "[1] a textually demonstrable constitutional commitment of the issue to a coordinate political

ing not addressed in previous cases of legislator suits against the executive branch.<sup>217</sup> Most important among these is whether a signing statement can ever amount to the nullification of a legislator's vote.<sup>218</sup>

On the one hand, signing statements look very much like the pocket veto that the D.C. Circuit in 1974 recognized as vote nullification in *Kennedy v. Sampson*.<sup>219</sup> The practical effect of each device is similar—preventing a bill from becoming law (in the case of a pocket veto) or preventing a law from being enforced (in the case of a signing statement).<sup>220</sup> On the other hand, a challenge to signing statements very much resembles a claim that the President is not complying with the law.<sup>221</sup> This type of injury has consistently been held insufficient to give legislators standing to sue the President.<sup>222</sup>

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department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question"). Most challenges to signing statements would not arise in a context where the Court has held that the political question doctrine restricts access to the federal courts. See *CHEMERINSKY*, *supra* note 23, at 130 (noting that the Court has considered the political question doctrine in the areas of the Republican Form of Government Clause and the electoral process, foreign affairs, Congress's ability to regulate its internal processes, the process for ratifying constitutional amendments, instances where the federal courts cannot shape effective equitable relief, and the impeachment process). Challenges to signing statements involving foreign policy questions would be the most likely to be dismissed on political question grounds. See *id.*

<sup>217</sup> See *Raines*, 521 U.S. at 814–16; *Coleman*, 307 U.S. at 438.

<sup>218</sup> See Exploring International Law, <http://explore.georgetown.edu/blogs/?id=17051> (July 25, 2004, 16:14 EST) (arguing that a President's complete disregard for a statute might qualify as vote nullification). Compare *Harrington v. Bush*, 553 F.2d 190, 211 (D.C. Cir. 1977) (holding that nullification had not occurred where there was no claim that votes were denied full force and effect), with *Kennedy v. Sampson*, 511 F.2d 430, 434, 436 (D.C. Cir. 1974) (holding nullification occurred where a "pocket veto" rendered a legislator's vote meaningless).

<sup>219</sup> 511 F.2d at 432, 436.

<sup>220</sup> See *id.* at 432; *Cooper*, *supra* note 162, at 517 (comparing signing statements to a line item veto).

<sup>221</sup> *Senate Hearing on Presidential Signing Statements*, *supra* note 4 (statement of Sen. Patrick Leahy, Ranking Member, S. Comm. on the Judiciary) ("President Bush has employed signing statements to ignore or disobey more than 750 laws.").

<sup>222</sup> See *Campbell v. Clinton*, 203 F.3d 19, 31 (D.C. Cir. 2000) (Randolph, J., concurring) (stating that serious separation of powers concerns are raised by the argument that "[w]e, the members of Congress, have standing because the President violated one of our laws"); *Harrington*, 553 F.2d at 213–14 (stating that "since the impact of illegality is shared by all citizens, appellant's complaint about the administration of the CIA Act becomes a 'generalized grievance about the conduct of government' which lacks the specificity to support a claim of standing" (quoting *Flast v. Cohen*, 392 U.S. 83, 106 (1968))).

#### IV. LEGISLATOR STANDING TO CHALLENGE SIGNING STATEMENTS: PROBLEMS AND POSSIBILITIES

This Part argues that although presidential signing statements do not rise to the level of vote nullification, they can still result in an institutional injury sufficient to give legislators standing.<sup>223</sup> The first Section explains why even those signing statements that express the President's intent to disobey a law do not amount to the nullification of legislators' votes.<sup>224</sup> The next Section explains that absent vote nullification, most challenges to signing statements present a generalized grievance and therefore the doctrine of separation of powers bars legislators from having standing.<sup>225</sup> The final Section argues that legislators should be eligible for standing even absent nullification when executive branch action deprives them of information to which they are statutorily entitled.<sup>226</sup>

##### A. *Signing Statements Do Not Amount to Vote Nullification*

The U.S. Supreme Court has not articulated a precise definition of vote nullification.<sup>227</sup> In particular, it is unclear to what extent the D.C. Circuit's interpretation of vote nullification survived the Supreme Court's 1997 decision in *Raines v. Byrd*.<sup>228</sup> Regardless of this uncertainty, signing statements do not meet the standard of vote nullification articu-

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<sup>223</sup> See *Raines v. Byrd*, 521 U.S. 811, 830 (1997) (denying standing where legislators' votes had not been nullified); *Harrington v. Bush*, 553 F.2d 190, 213-14 (D.C. Cir. 1977) (holding that legislators do not have standing when they assert only a generalized grievance about the conduct of government (quoting *Flast v. Cohen*, 392 U.S. 83, 106 (1968))).

<sup>224</sup> See *infra* notes 227-254 and accompanying text.

<sup>225</sup> See *infra* notes 255-283 and accompanying text.

<sup>226</sup> See *infra* notes 284-313 and accompanying text.

<sup>227</sup> See *supra* note 160 and accompanying text.

<sup>228</sup> See 521 U.S. at 823 (stating that "legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified"). Following the *Raines* decision, the D.C. Circuit wrestled with the question of whether *Kennedy v. Sampson*, which held that the President's pocket veto was tantamount to vote nullification, was still good law. Compare *Campbell v. Clinton*, 203 F.3d 19, 23 (D.C. Cir. 2000) (implying that the holding in *Kennedy* does not survive the *Raines* decision because future legislative action was a remedy available to Senator Kennedy in challenging President Nixon's pocket veto), with *id.* at 32 (Randolph, J., concurring) (arguing that *Kennedy* is still good law after *Raines*), and *Chenoweth v. Clinton*, 181 F.3d 112, 116-17 (D.C. Cir. 1999) (stating that the *Kennedy* holding could survive the Court's articulation of vote nullification in *Raines*).

lated in *any* of the cases in which a court has held that nullification occurred.<sup>229</sup>

There are important differences between presidential signing statements and other executive branch action that has been found to amount to vote nullification.<sup>230</sup> Most importantly, a refusal to enforce or comply with a law (as expressed in a signing statement) does not prevent that law from going into effect.<sup>231</sup> Unlike the facts at issue before the D.C. Circuit in the 1974 case of *Kennedy v. Sampson*, where President Nixon's use of the "pocket veto" was designed to prevent a bill from becoming law, signing statements are issued while the President simultaneously *signs a bill into law*.<sup>232</sup> President Bush's signing statement accompanying the USA PATRIOT Improvement and Reauthorization Act, for example, did not prevent that bill from becoming law but rather expressed only the President's belief that he is not required to comply with it fully.<sup>233</sup> Therefore, unlike the cases in which the courts have found that vote nullification has occurred, signing statements do not deny legislators the opportunity to vote or cause their votes to go uncounted.<sup>234</sup>

This distinction is important because it goes directly to the issue of whether legislators have been permitted to fulfill their constitutionally mandated role.<sup>235</sup> When legislators' votes are ignored or uncounted, it diminishes, or even abolishes, their constitutional power to make

<sup>229</sup> See *Coleman v. Miller*, 307 U.S. 433, 438 (1939); *Goldwater v. Carter*, 617 F.2d 697, 703 (D.C. Cir. 1979), *vacated and remanded on other grounds*, 444 U.S. 996 (1979); *Kennedy v. Sampson*, 511 F.2d 430, 436 (D.C. Cir. 1974).

<sup>230</sup> See *Coleman*, 307 U.S. at 436 (illegal tie-breaking vote cast by lieutenant governor); *Goldwater*, 617 F.2d at 701 (President's unilateral termination of a treaty); *Kennedy*, 511 F.2d at 432 (President's use of an illegal "pocket veto").

<sup>231</sup> Cooper, *supra* note 162, at 516 (noting that signing statements are issued when a President signs a bill into law).

<sup>232</sup> See 511 F.2d at 432; Cooper, *supra* note 162, at 516.

<sup>233</sup> See Patriot Act Signing Statement, *supra* note 188.

<sup>234</sup> See *Coleman*, 307 U.S. at 438 (holding that state senators had standing because their votes were "overridden and virtually held for naught"); *Goldwater*, 617 F.2d at 703 (holding U.S. Senators had standing where the President's action deprived them completely of voting opportunity); *Kennedy*, 511 F.2d at 436 (holding that a U.S. Senator had standing to vindicate the effectiveness of his vote, which had been diminished by the use of a "pocket veto"); cf. *Raines*, 521 U.S. at 824 (holding that U.S. Representatives lacked standing where their votes on the bill at issue were given full effect).

<sup>235</sup> See U.S. CONST. art. I, § 1 ("All legislative powers herein granted shall be vested in a Congress of the United States . . .").



laws.<sup>236</sup> In this situation, votes have truly been nullified and allowing legislators to resort to the courts to seek relief is justified.<sup>237</sup>

Where legislators' ability to make laws is in no way impaired, on the other hand, their votes are not nullified regardless of how the executive branch enforces those laws.<sup>238</sup> That legislators have not been denied the ability to vote on bills or pass legislation is important in distinguishing the injury that signing statements cause from vote nullification.<sup>239</sup> Even if a President refuses outright to enforce a law, this refusal does not alter the fact that the law has been passed and recorded as a valid statute.<sup>240</sup> The fact that the statute exists is important because it gives a *private party who actually suffers an injury* as a result of its nonenforcement the right to bring a claim.<sup>241</sup>

An example using one of President Bush's recent signing statements is illustrative.<sup>242</sup> In 2002, in passing the Export-Import Bank Re-

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<sup>236</sup> See *Coleman*, 307 U.S. at 438; *Goldwater*, 617 F.2d at 703; *Kennedy*, 511 F.2d at 436.

<sup>237</sup> See *Coleman*, 307 U.S. at 438 (granting standing where votes were "overridden and virtually held for naught"); *Goldwater*, 617 F.2d at 703 (granting standing where legislators were denied completely of voting opportunity); *Kennedy*, 511 F.2d at 436 (granting standing where a vote was rendered meaningless by the use of a "pocket veto").

<sup>238</sup> See *Raines*, 521 U.S. at 824; *Campbell*, 203 F.3d at 22; *Harrington*, 553 F.2d at 211.

<sup>239</sup> See *Raines*, 521 U.S. at 824 (nullification did not occur where legislators' votes had been given full effect); *Campbell*, 203 F.3d at 22 (explaining that nullification does not occur whenever the government does something Congress voted against); *Harrington*, 553 F.2d at 211 (holding no nullification occurred where there was no claim that past votes were denied full force and effect as a result of the CIA activities in question); Cooper, *supra* note 162, at 516 (noting that signing statements are issued at the time a congressional enactment is signed into law).

<sup>240</sup> See, e.g., Export-Import Bank Reauthorization Act Signing Statement, *supra* note 190 ("The executive branch shall carry out section 7(b) of the bill, which relates to certain small businesses, in a manner consistent with the requirements of equal protection under the Due Process Clause of the Fifth Amendment to the Constitution."). Despite the President's expressed intention not to enforce provisions of the Export-Import Bank Reauthorization Act, those provisions still became law. See 12 U.S.C. § 635(b)(1)(E)(iii)(II) (Supp. III 2003) (requiring "emphasis on conducting outreach and increasing loans to socially and economically disadvantaged small business concerns . . . [and] small business concerns . . . owned by women").

<sup>241</sup> See *Warth v. Seldin*, 422 U.S. 490, 514 (1974) (noting that "Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute"); *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 212 (1972) (White, J., concurring) (stating that in the absence of the Civil Rights Act of 1968 plaintiffs would not have had standing to bring their case, but that the statute conferred standing upon them). But see *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 (1992) (holding that the injury-in-fact requirement was not satisfied by "congressional conferral upon all persons of an abstract, self-contained, noninstrumental 'right' to have the Executive observe the procedures required by law").

<sup>242</sup> See Export-Import Bank Reauthorization Act Signing Statement, *supra* note 190.

authorization Act, Congress included a provision requiring that emphasis be placed on increasing loans to small businesses owned by women.<sup>243</sup> In a signing statement, President Bush indicated his belief that this provision violates the requirements of equal protection.<sup>244</sup> Assuming that President Bush ignores this provision, and makes no effort to increase loans to small businesses owned by women, legislators have still been effective in passing this bill.<sup>245</sup> As a result of the law's enactment, someone who is injured by the President's action (for example, a woman who has been unable to secure a loan for her small business) could now bring suit on the basis that he is ignoring the law.<sup>246</sup> Such an individual would likely have standing on the grounds that she has suffered injury to an interest protected by the statute that the President is ignoring.<sup>247</sup>

Critics argue that in some situations there will be no private litigant injured sufficiently to have standing and that members of Congress should therefore be permitted to challenge a President's violation of the law.<sup>248</sup> The Court's statement in *Raines*, noting that its decision does not foreclose a challenge by someone who actually suffers injury, lends some support to the idea that the existence of other plaintiffs is relevant.<sup>249</sup> On other occasions, however, the Court has explicitly held that "[t]he assumption that if [plaintiffs] have no standing to sue, no

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<sup>243</sup> Export-Import Bank Reauthorization Act § 7(b).

<sup>244</sup> Export-Import Bank Reauthorization Act Signing Statement, *supra* note 190.

<sup>245</sup> See *Warth*, 422 U.S. at 514; *Trafficante*, 409 U.S. at 212 (White, J., concurring).

<sup>246</sup> See Export-Import Bank Reauthorization Act of 2002, Pub. L. No. 107-189, § 7(b), 116 Stat. 698, 700 (codified as amended at 12 U.S.C. § 635(b)(1)(E)(iii)(II) (Supp. III 2003)); *Warth*, 422 U.S. at 514; *Trafficante*, 409 U.S. at 212 (White, J., concurring).

<sup>247</sup> See *Lujan*, 504 U.S. at 560 (holding that standing requires the invasion of a legally protected interest); *Warth*, 422 U.S. at 514 (holding that existence of a statute can convert an otherwise unprotected interest into a legally protected interest). The language in the Export-Import Bank Reauthorization Act may not be sufficient to confer standing because it contains no explicit language of conferral. See § 7(b); *cf. Lujan*, 504 U.S. at 571-72 (noting that Endangered Species Act contained an explicit conferral of standing to "any person"); *Trafficante*, 409 U.S. at 206 n.1 (noting that the Civil Rights Act contained an explicit conferral of standing to "[a]ny person who claims to have been injured by a discriminatory housing practice"). Congress, however, could easily remedy this by amending the law to provide that anyone harmed by its violation could bring a claim in the federal courts. See *Trafficante*, 409 U.S. at 206 n.1.

<sup>248</sup> See *Senate Hearing on Presidential Signing Statements*, *supra* note 4 (testimony of Bruce Fein); Exploring International Law, <http://explore.georgetown.edu/blogs/?id=17051> (July 25, 2004, 04:14 EST) ("[I]t is possible that, unlike with the Line Item Veto Act . . . there may be no other possible plaintiffs. If that were the case, the Court might look more favorably on granting federal legislator standing.").

<sup>249</sup> See 521 U.S. at 829.

one would have standing, is not a reason to find standing."<sup>250</sup> Where no one is sufficiently injured to qualify for standing, the doctrine of separation of powers mandates that courts leave the dispute to be resolved by the political process.<sup>251</sup>

Because signing statements do not render legislators' votes meaningless, they do not rise to the level of vote nullification.<sup>252</sup> When the President signs a bill, it becomes law and members of Congress have been able to exercise their legislative powers fully.<sup>253</sup> Regardless of how that law is enforced, legislators' votes have been given full effect and nullification has not occurred.<sup>254</sup>

### B. *The Separation of Powers as a Bar to Recognizing Institutional Injuries Beyond Vote Nullification*

Absent vote nullification, the question remains whether legislators can still claim some other form of institutional injury sufficient to give them standing.<sup>255</sup> Most potential challenges to presidential signing statements can allege one of two injuries.<sup>256</sup> First, legislators can claim that they, like all citizens, are injured by the President's refusal to com-

<sup>250</sup> *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974); see *United States v. Richardson*, 418 U.S. 166, 179 (1974) (stating that "the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed . . . ultimately to the political process").

<sup>251</sup> See *Schlesinger*, 418 U.S. at 227 (holding that a generalized grievance is insufficient for standing and stating that "[o]ur system of government leaves many crucial decisions to the political processes"); *Richardson*, 418 U.S. at 179.

<sup>252</sup> See *Raines*, 521 U.S. at 824 (holding no nullification occurred where legislators' votes were given full effect); *Campbell*, 203 F.3d at 22 (explaining that nullification does not occur whenever the government does something Congress voted against); *Harrington*, 553 F.2d at 211 (holding no nullification occurred where there was no claim that votes were denied full force and effect).

<sup>253</sup> U.S. CONST. art. I, § 7, cl. 2; see *Raines*, 521 U.S. at 825-26 (implying that legislators' interest in maintaining the effectiveness of their votes does not extend beyond having those votes counted and given full effect towards the passage of a bill).

<sup>254</sup> See *Raines*, 521 U.S. at 824; *Campbell*, 203 F.3d at 22; *Harrington*, 553 F.2d at 211.

<sup>255</sup> See *Raines*, 521 U.S. at 829. Although *Raines* did not explicitly hold that vote nullification is the only institutional injury that could give legislators standing, some have interpreted the decision as saying as much. See *Arend & Lotrionte*, *supra* note 6, at 273 (noting that after *Raines*, the D.C. Circuit "has seemed to acknowledge that a nullification of a vote is the only basis for legislator standing").

<sup>256</sup> See *Senate Hearing on Presidential Signing Statements*, *supra* note 4 (statement of Sen. Patrick Leahy, Ranking Member, S. Comm. on the Judiciary) (protesting that "President Bush has employed signing statements to ignore or disobey more than 750 laws"); 152 CONG. REC. S8271 (daily ed. July 26, 2006) (statement of Sen. Arlen Specter) (describing signing statements as an "attempt to usurp legislative authority").

ply with the law.<sup>257</sup> Second, legislators can claim that because of their role in creating the laws, presidential signing statements diminish their legislative power.<sup>258</sup> The Court has explicitly held that the latter injury is insufficient for standing.<sup>259</sup> The former injury is a quintessential generalized grievance that is, as this Section demonstrates, barred from the federal courts by the separation of powers.<sup>260</sup>

Legislator claims involving vote nullification are sufficient for standing because the alleged injury affects legislators in a particularized manner.<sup>261</sup> When legislators claim that the President is disobeying the law through a signing statement, however, the injury they present is a generalized grievance.<sup>262</sup> The harm from the President's action falls equally on all citizens.<sup>263</sup> Furthermore, the Court has held that the bar against generalized grievances is part of the constitutional requirement for standing, meaning that it cannot be overcome by congressional statute.<sup>264</sup> Senator Arlen Specter's bill proposing to grant standing to members of Congress, if passed, would therefore be insufficient to give legislators standing to challenge presidential signing statements.<sup>265</sup> Indeed, the fact that the Line Item Veto Act in *Raines* attempted to grant

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<sup>257</sup> See *Senate Hearing on Presidential Signing Statements*, *supra* note 4 (statement of Sen. Patrick Leahy, Ranking Member, S. Comm. on the Judiciary) (protesting that "President Bush has employed signing statements to ignore or disobey more than 750 laws").

<sup>258</sup> See 152 CONG. REC. S8271 (statement of Sen. Arlen Specter) (describing signing statements as an "attempt to usurp legislative authority").

<sup>259</sup> See *Raines*, 521 U.S. at 821, 830 (holding that diminution of legislative power is an injury insufficient for standing).

<sup>260</sup> See *Campbell*, 203 F.3d at 315 (Randolph, J., concurring) (stating that the argument that "[w]e, the members of Congress, have standing because the President violated one of our laws" raises serious separation of powers concerns); *Harrington*, 553 F.2d at 213-14 (holding that a U.S. Representative lacked standing because his alleged injury resulting from the executive branch's illegal activity fell equally on all citizens, and therefore constituted a generalized grievance about the conduct of government (quoting *Flast*, 392 U.S. at 106)).

<sup>261</sup> *Lujan*, 504 U.S. at 560 (stating that an injury must be particularized to be sufficient for standing); see *Coleman*, 307 U.S. at 438 (implying that vote nullification is sufficiently particularized to give legislators standing).

<sup>262</sup> See *Senate Hearing on Presidential Signing Statements*, *supra* note 4 (statement of Sen. Patrick Leahy, Ranking Member, S. Comm. on the Judiciary) ("President Bush has employed signing statements to ignore or disobey more than 750 laws."); Savage, *supra* note 161 (describing George W. Bush's signing statements as claimed authority to disobey laws).

<sup>263</sup> See *Harrington*, 553 F.2d at 213-14 (holding that a U.S. Representative lacked standing because his claimed injury resulting from illegal activity by the executive branch fell equally on all citizens, and therefore constituted a generalized grievance about the conduct of government (quoting *Flast*, 392 U.S. at 106)).

<sup>264</sup> *Lujan*, 504 U.S. at 573-74.

<sup>265</sup> See Presidential Signing Statements Act of 2006, S. 3731, 109th Cong. § 5 (2006).

standing to members of Congress was insufficient to overcome the constitutional requirements for standing.<sup>266</sup>

Legislators attempting to challenge signing statements, like other plaintiffs raising a generalized grievance, should not be granted standing in the federal courts due to the doctrine of separation of powers.<sup>267</sup> The concern with such a claim is not that Congress is attempting to intrude on the executive branch, but rather that by hearing a claim of this nature, the courts would be intruding on both of the political branches.<sup>268</sup> The Court's statements on numerous occasions that the doctrine of standing's primary purpose is to limit the role of the courts in a democratic society reflect this concern.<sup>269</sup>

Hearing cases involving a generalized grievance violates the doctrine of separation of powers because it requires the federal courts to step in to protect the rights of the majority.<sup>270</sup> As the only undemocratic branch of the federal government, the role of the courts is to protect the rights of individuals.<sup>271</sup> Vindicating the public interest, on the other hand, is the function of the President and Congress as popularly elected branches of government.<sup>272</sup> Not only is vindicating the public interest the job of the political branches, but it is also a role for which the courts are particularly ill-suited.<sup>273</sup>

A challenge to signing statements brought by legislators demonstrates why the federal courts should not resolve disputes involving generalized grievances.<sup>274</sup> When the President disobeys a law (after ex-

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<sup>266</sup> See *Raines*, 521 U.S. at 820 n.3.

<sup>267</sup> See *Lujan*, 504 U.S. at 576-77; *Allen v. Wright*, 468 U.S. 737, 752 (1983); Scalia, *supra* note 19, at 894.

<sup>268</sup> See *Lujan*, 504 U.S. at 576-77; see also *Raines*, 521 U.S. at 819-20 (stating that "our standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether action taken by one of the other two branches of the Federal Government was unconstitutional").

<sup>269</sup> See *Allen*, 468 U.S. at 752 ("[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers."); *Warth*, 422 U.S. at 498 (stating that standing "is founded in concern about the proper—and properly limited—role of the courts in a democratic society"); see also *Lujan*, 504 U.S. at 559-60 (describing standing as the mechanism by which the role of the courts is limited and the separation of powers maintained).

<sup>270</sup> See *Lujan*, 504 U.S. at 576-77; Scalia, *supra* note 19, at 894.

<sup>271</sup> *Lujan*, 504 U.S. at 576 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803)); Scalia, *supra* note 19, at 894.

<sup>272</sup> *Lujan*, 504 U.S. at 576.

<sup>273</sup> Scalia, *supra* note 19, at 896 (explaining that the courts have "in a way been specifically designed to be bad at [protecting the rights of the majority]—selected from the aristocracy of the highly educated, instructed to be governed by a body of knowledge that values abstract principle above concrete result . . . and removed from all accountability to the electorate").

<sup>274</sup> See *Lujan*, 504 U.S. at 576-77; Scalia, *supra* note 19, at 894.

pressing his intent to do so in a signing statement), his actions potentially harm either the majority of citizens or a minority group.<sup>275</sup> A challenge brought by legislators does not involve an injury to themselves as a minority group, but rather represents an attempt to utilize the federal courts to protect what they perceive to be an interest of a majority of citizens—an interest in having the President obey the law.<sup>276</sup> Granting standing to legislators is inappropriate because the majority interest they are asserting is protected through the political process—if a majority of citizens disapprove of the President's actions, they can vote him or her out of office.<sup>277</sup>

Where only a minority group is injured, however, the political process does not adequately protect its rights.<sup>278</sup> Accordingly, individuals who are injured by the President's signing statement will have standing to challenge that action in the federal courts.<sup>279</sup>

This dynamic is demonstrated by the litigation over the Line Item Veto Act of 1996.<sup>280</sup> Following the dismissal of a suit brought by legislators for lack of standing in *Raines*,<sup>281</sup> the Supreme Court in 1998 in *Clinton v. City of New York* granted standing to a group of plaintiffs who had suffered direct economic injury as a result of the President's use of the Line Item Veto.<sup>282</sup> Unlike the legislators in *Raines*, these plaintiffs were not asserting harm to a majority interest but rather harm to a minority interest that justified the involvement of the judicial branch.<sup>283</sup>

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<sup>275</sup> See, e.g., Emergency Supplemental Appropriations Act Signing Statement, *supra* note 194. President Bush's signing statement regarding the Detainee Treatment Act of 2005 could be seen as potentially harming majority or minority interests. See *id.* By reserving the right to use certain methods of torture, this signing statement potentially injures the minority group comprised of detainees who might now be subject to such torture. See *id.* His ignoring this statute could also be seen as harming a majority interest if a majority of citizens desire that the U.S. military not engage in certain forms of interrogation because they believe it is cruel or damaging to the reputation of the United States. See *id.*

<sup>276</sup> See Scalia, *supra* note 19, at 894.

<sup>277</sup> See *Lujan*, 504 U.S. at 576.

<sup>278</sup> See Scalia, *supra* note 19, at 895.

<sup>279</sup> See *Lujan*, 504 U.S. at 576.

<sup>280</sup> See *Clinton v. City of New York*, 524 U.S. 417, 421 (1998); *Raines*, 521 U.S. at 814.

<sup>281</sup> 521 U.S. at 830.

<sup>282</sup> 524 U.S. at 430.

<sup>283</sup> See *id.*; *Raines*, 521 U.S. at 829–30 (citing *United States v. Richardson*, 418 U.S. 166, 192 (1966)).

C. *An Argument for Standing Where a Presidential Signing Statement Deprives Legislators of Information to Which They Are Entitled*

Although signing statements never reach the level of vote nullification<sup>284</sup> and the majority of legislator claims amount to nothing more than generalized grievances,<sup>285</sup> there is at least one possible circumstance where a presidential signing statement sufficiently injures members of Congress to give them standing in the federal courts.<sup>286</sup> Where the President's refusal to obey the law deprives legislators of information to which they are entitled, they suffer an injury that is concrete and particularized, and therefore adequate for standing.<sup>287</sup>

An example of this scenario is illustrated by the USA PATRIOT Improvement and Reauthorization Act of 2005 (the "Act") and the President's signing statement in response.<sup>288</sup> In the Act, Congress required the Inspector General of the Department of Justice (the "DOJ") to conduct audits of the DOJ's use of Patriot Act provisions and report the results of these audits to certain committees of Congress.<sup>289</sup> In a signing statement, President Bush responded that he would construe the Act "in a manner consistent with the President's constitutional authority to supervise the unitary executive branch and to withhold information the disclosure of which could impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties."<sup>290</sup> Essentially, President Bush suggested that he was not required to comply with the Act to the extent that it required the executive branch to provide certain information to Congress.<sup>291</sup>

Although a refusal to provide Congress with information does not nullify those legislators' votes,<sup>292</sup> it nonetheless injures them in a concrete and particularized way.<sup>293</sup> The Court has never granted legislators

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<sup>284</sup> See *supra* notes 227–254 and accompanying text.

<sup>285</sup> See *supra* notes 255–283 and accompanying text.

<sup>286</sup> See Patriot Act Signing Statement, *supra* note 188.

<sup>287</sup> See *id.*

<sup>288</sup> See USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, §§ 106A, 119, 120 Stat. 192, 201-02, 219-21 (2006); Patriot Act Signing Statement, *supra* note 188.

<sup>289</sup> USA PATRIOT Improvement and Reauthorization Act §§ 106A, 119.

<sup>290</sup> Patriot Act Signing Statement, *supra* note 188.

<sup>291</sup> See *id.*

<sup>292</sup> See *supra* notes 227–254 and accompanying text.

<sup>293</sup> See *Lujan*, 504 U.S. at 560 (holding that injury sufficient for standing requires concrete and particularized harm); *Warth*, 422 U.S. at 508 (holding that plaintiff "must allege specific, concrete facts demonstrating that the challenged practices harm him" to qualify for standing).

standing for an institutional injury other than vote nullification, but it has also never explicitly held that no other injury is sufficient.<sup>294</sup> Therefore, President Bush's Patriot Act signing statement (or a similar signing statement) presents an opportunity for legislator standing, and members of Congress who desire to challenge the practice of issuing signing statements should bring a claim based on this type of signing statement.<sup>295</sup>

Despite amounting to less than nullification, the injury to legislators caused by such a signing statement is distinguishable from the injury in *Raines* that was found insufficient for standing.<sup>296</sup> As explained, an interpretation of *Raines* that rests on the distinction between personal and official injury is unsustainable.<sup>297</sup> The *Raines* Court also declined to hold that the injury at issue was distinguishable from *Coleman v. Miller* on the grounds that that case involved state legislators.<sup>298</sup> *Raines* is thus best understood as holding that diminution of legislative power is an injury insufficient for standing because, unlike vote nullification, it is "wholly abstract and widely dispersed."<sup>299</sup>

The injury to members of Congress that the President's Patriot Act Reauthorization signing statement causes, unlike the "diminution

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<sup>294</sup> See *Raines*, 521 U.S. at 823 (holding that legislators lacked standing where their votes were not nullified but not foreclosing the possibility that other injuries could be sufficient); Alexander, *supra* note 6, at 698 (arguing that injuries other than nullification are sufficient to give legislators standing). But see Arend & Lotrionte, *supra* note 6, at 273 (stating that "the D.C. Circuit has seemed to acknowledge that nullification of a vote is the *only* basis for legislator standing").

<sup>295</sup> See Patriot Act Signing Statement, *supra* note 188. Legislators would still have to overcome the obstacle of ripeness. See *supra* note 216. For a challenge to this signing statement to be ripe, the President (or Department of Justice) would actually have to withhold information from members of Congress in accordance with President Bush's signing statement. See *supra* note 216.

<sup>296</sup> See *Raines*, 521 U.S. at 829 (describing the plaintiffs' injury as "wholly abstract and widely dispersed").

<sup>297</sup> See *Standing in the Way*, *supra* note 151, at 1749 ("Commentators . . . agree that '[t]he allowance of suit in an official capacity is commonplace in American jurisprudence.'" (quoting *TRIBE*, *supra* note 23, § 3-20, at 150)); see also *Leading Cases*, *supra* note 152, at 222 n.47 (noting that prior to *Raines* "the Court primarily had employed the personal injury requirement to ensure that the alleged injury was particularized, and not to distinguish between personal- and official-capacity injuries").

<sup>298</sup> *Raines*, 521 U.S. at 824 n.8.

<sup>299</sup> See *id.* at 829; cf. *Coleman*, 307 U.S. at 438. Nullification of a *specific vote* is a more concrete and tangible injury than diminution of legislative power, and nullification injures only a particular class of legislators—those legislators whose votes, if given full effect, would have been sufficient to achieve a desired legislative result. See *Leading Cases*, *supra* note 152, at 223 (explaining that the vote nullification in *Coleman* is distinguishable from *Raines* because it presents an injury that is more concrete).



of legislative power" in *Raines*, is concrete and particularized.<sup>300</sup> This injury does not fall on all members of Congress, but rather only on a discrete group of members on select committees.<sup>301</sup> The injury cannot therefore be characterized as "widely dispersed."<sup>302</sup> Additionally, this signing statement injures these specific members of Congress by depriving them of reports to which they are entitled.<sup>303</sup> Unlike the diminution of legislative power, such an injury is not "wholly abstract" but rather tangible and concrete.<sup>304</sup>

Furthermore, much like vote nullification, when legislators are deprived of information, the harm they suffer is not a majoritarian harm and is not adequately protected by the political process.<sup>305</sup> The effects of the President's refusal to obey the Patriot Act would not fall equally on all citizens but rather would uniquely affect members of Congress who are denied information.<sup>306</sup>

Some would argue that this is still a majoritarian harm because legislators are only representatives of the people, and therefore any injury they suffer in their role as legislators is actually harm to all citizens.<sup>307</sup> Although this reasoning seems logical, the same argument

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<sup>300</sup> See *Raines*, 521 U.S. at 829; Patriot Act Signing Statement, *supra* note 188.

<sup>301</sup> See USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, §§ 106A, 119, 120 Stat. 192, 201-02, 219-21 (2006) (requiring the Inspector General of the Department of Justice to provide audits to the Committee on the Judiciary and the Permanent Select Committee on Intelligence of the House of Representatives and the Committee on the Judiciary and the Select Committee on Intelligence of the Senate).

<sup>302</sup> Cf. *Raines*, 521 U.S. at 829 (describing an injury that falls on all members of Congress as "widely dispersed").

<sup>303</sup> See Patriot Act Signing Statement, *supra* note 188.

<sup>304</sup> Cf. *Raines*, 521 U.S. at 829 (describing diminution of legislative power as a "wholly abstract" injury).

<sup>305</sup> See Scalia, *supra* note 19, at 895.

<sup>306</sup> See USA PATRIOT Improvement and Reauthorization Act §§ 106A, 119; cf. *Harrington*, 553 F.2d at 213-14 (holding that harm that is shared by all citizens is insufficient for standing). The facts in *Harrington v. Bush* closely resemble the proposed challenge to the Patriot Act signing statement, but with important differences. See *Harrington*, 553 F.2d at 195. In *Harrington* a legislator claimed that he was denied information about the receipts and expenditures of the CIA to which he was statutorily entitled. *Id.* Although the court denied standing, a crucial difference lies in the fact that in *Harrington*, Congress had enacted a specific exception for CIA appropriations. *Id.* Only members of the Subcommittee on Intelligence of the House Appropriations Committee were entitled to the information about CIA appropriations, and therefore Congressman Harrington really had no claim that he was entitled to this information at all. See *id.*

<sup>307</sup> See *Barnes v. Kline*, 759 F.2d 21, 50 (D.C. Cir. 1985) (Bork, J., dissenting), *vacated as moot*, 479 U.S. 361 (1987) (arguing that because members of Congress hold their office in trust for their constituents, it is impossible that a legislator could have standing to sue in his official capacity for an injury that would not give standing to any of his or her constituents); *Moore v. U.S. House of Representatives*, 733 F.2d 946, 959 (D.C. Cir. 1984) (Scalia,

would apply equally to vote nullification.<sup>308</sup> The harm that legislators suffer as the result of vote nullification can similarly be characterized as an injury to constituents who have had their representative power in government diminished.<sup>309</sup> The Court's rejection of this argument with regard to vote nullification indicates that it recognizes that some injuries to legislators in their official capacity can be considered harms to minority interests requiring the protection of the courts.<sup>310</sup>

If members of Congress are serious about having the federal courts entertain cases involving signing statements, a challenge to President Bush's Patriot Act Reauthorization signing statement (or a similar signing statement) presents the best opportunity.<sup>311</sup> A challenge to this signing statement cannot be easily dismissed as a generalized grievance like many other challenges.<sup>312</sup> Even though legislators would not be claiming an injury of vote nullification, denial of information presents a concrete and particularized injury of such a similar nature that it can support a claim of standing.<sup>313</sup>

### CONCLUSION

Challenges to presidential signing statements introduce a new wrinkle to the complex doctrine of legislator standing. At first glance, these claims do not appear to fit neatly into either the category of cases where standing has been granted or into those where it has explicitly

J., concurring) (arguing that legislators "wield those powers not as private citizens but only through the public office which they hold," and therefore should never be granted standing for injuries to their legislative powers).

<sup>308</sup> See *Barnes*, 759 F.2d at 50 (Bork, J., dissenting); *Moore*, 733 F.2d at 959 (Scalia, J., concurring). Justice Frankfurter made this argument in his separate opinion in *Coleman*, 307 U.S. at 470 (Frankfurter, J.) (stating that claims of vote nullification "pertain to legislators not as individuals but as political representatives executing the legislative process" and "[i]n no sense are they matters of 'private damage'").

<sup>309</sup> See *Coleman*, 307 U.S. at 470 (Frankfurter, J.); *Barnes*, 759 F.2d at 50 (Bork, J., dissenting); *Moore*, 733 F.2d at 959 (Scalia, J., concurring).

<sup>310</sup> See *Coleman*, 307 U.S. at 438 (majority opinion) (holding that senators' "plain, direct, and adequate interest in maintaining the effectiveness of their votes" is sufficient to give them standing in the federal courts); Scalia, *supra* note 19, at 894 (stating that the role of the courts is to protect individuals and minorities against impositions of the majority); see also *Raines*, 521 U.S. at 832 (Souter, J., concurring) (arguing that as a factual matter, legislators have a more direct and tangible interest in the preservation of their legislative power than the general citizenry); *Standing in the Way*, *supra* note 151, at 1749 (noting that representatives can have interests different from the interests of their constituents).

<sup>311</sup> See Patriot Act Signing Statement, *supra* note 188.

<sup>312</sup> Cf. *Harrington*, 553 F.2d at 213-14 (holding that a legislator claim that the executive branch is acting illegally constitutes a generalized grievance).

<sup>313</sup> See *Coleman*, 307 U.S. at 438; cf. *Raines*, 521 U.S. at 829.

been rejected. A closer look at the justifications for granting or denying legislators standing, however, reveals that in almost all circumstances signing statements do not result in an injury sufficient to give legislators standing. Absent vote nullification, almost any claim that legislators could bring would constitute a generalized grievance. Conferring standing on legislators in these circumstances would violate the separation of powers.

Despite this, the fact that vote nullification has been held sufficient to give legislators standing opens the door for recognition of other injuries—in particular, the deprivation of information to which legislators are statutorily entitled. The President has claimed the authority to disobey laws that require the executive branch to share information with Congress. If he follows through with this assertion, legislators who wish to challenge him may succeed in having their day in court.

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